Central Law Journal.

ST. LOUIS, MO., NOVEMBER 22, 1895.

St. Louis, I. M. & S. Ry. Co. v. Kelley, decided by the Supreme Court of Arkansas, forcibly illustrates what is and what is not *res gestæ* of an accident, within the rule of admissibility in evidence. There it appeared that defendant's brakeman, who was carrying home an injured child immediately after an accident, being asked how it happened, replied that he gave the engineer the signal to stop the train, but as the engineer was looking the other way, he did not see it until it was too late. It was held that the statement of the brakeman constituted a narrative of a past transaction, and was not admissible as part of the *res gestæ*. The statement was made after the accident in response to an inquiry by a witness. The acts to which it referred were completely past. The injured child had been borne away from the place of the accident. It was not a spontaneous utterance called forth by the accident, but was made in response to inquiry and was only a narration of past transactions by which he was endeavoring to show that not himself but another was to blame for the accident. Where there are some cases that support the admission of such statements, as part of the *res gestæ*, yet the best considered cases, and the weight of authority seems to be the other way. It was said in a recent case that the *res gestæ* are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events Graves v. People (Colo.), 32 Pac. Rep. 63. See, also, Railroad Co. v. O'Brien, 119 U. S. 105, 7 Sup. Ct. Rep. 118, and cases cited in note; Waldele v. Railway Co., 95 N. Y. 274; Sullivan v. Navigation Co., 12 Or. 392, 7 Pac. Rep. 508; 1 Greenl. Ev., Sec. 108; Oil Co. v. Slover, 58 Ark. 179, 24 S. W. Rep. 106.

The recent decision of Bryant's Pond Steam Mill Co. v. Felt, by the Supreme Court of Maine, emphasizes the distinction between a subscription to the capital stock of a business corporation and one made to a public or charitable organization, as regards the right to revoke. While a subscriber to the capital stock of an unorganized business corporation has a right to withdraw from the enterprise provided he exercises the right before the corporation is organized and before his subscription is accepted, this rule does not apply to voluntary and gratuitous subscriptions to public and charitable objects, which when accepted and acted upon become binding, nor, of course, to subscription papers so worded as to become binding contracts between the subscribers themselves. This decision is in accord with the authorities, which hold that a subscriber may withdraw at any time prior to the filing of the articles of incorporation.

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According to the Supreme Court of New Jersey in the case of State v. Judges, etc., congress is without power to interfere with or control State courts, except in so far as the federal courts have appellate jurisdiction and cannot, without the consent of the State, constrain the State courts to entertain or act upon application for naturalization. It is also held that it is competent for the State legislature to prescribe and limit the times when and during which such applications may be heard in the State courts. As the court says, if congress has, without the consent of the State, the power to impose such a duty upon the State courts, there is no legal limit to the authority of the national legislature to burden the State courts with such a volume of business, as to essentially impair their capacity to exercise the judicial functions for which they were created by the State. The inability of congress thus to fetter and disable the instrumentalities provided by the State for carrying on the operations of its own government was the ground upon which the power of the federal government to lay an income tax upon the salaries of the State judiciary was denied in Collector v. Day (11 Wall. 113). Chancellor Kent, in his Commentaries, says that in Houston v. Moore (5 Wheat. 1), the Supreme Court disclaimed the idea that congress could authoritatively bestow judicial powers on State courts. In that case it is said that it is perfectly clear that congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United

States, although the State courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal courts. The learned author declares that in the case last cited the judges of the Supreme Court very clearly intimated that the State courts were not bound, in consequence of any act of congress, to assume and exercise jurisdiction in such cases, and he regards the doctrine as well founded that congress cannot compel a State court to entertain jurisdiction in any case 1 Kent, Comm., 399, 400, 402. Such has been the view adopted by State courts, where the question has been involved. Haney v. Sharp, 1 Dana, 442; *Ex parte* Pool, 2 Va. Cas. 276. The national courts have recognized their want of authority, in cases not within the appellate jurisdiction of the United States, to issue injunctions to the State courts, or in any other manner to interfere with their jurisdiction or proceedings. Diggs v. Wolcott, 4 Cranch. 179.

NOTES OF RECENT DECISIONS.

FOREIGN CORPORATION — ATTACHMENT OF STOCK—BY-LAWS.—Interesting questions as to attachment of stock of a non-resident in a foreign corporation came before the Supreme Court of Rhode Island in Ireland v. Globe Milling & Reduction Company, 32 Atl. Rep. 931, the holdings being that stock of a non-resident in a corporation organized under the the laws of one State cannot be attached in another State, the stock not being actually or constructively there, though its business is being carried on there, and its officers are there; that even if stock of a corporation can, under any circumstances, be reached by garnishment, it cannot where it is stock of a foreign corporation, owned by a non-resident, and is not present in the State; and that where the general statute of a State relating to corporations confers on a corporation power to enact by-laws for certain specified purposes, it can enact none for any other purpose. The court says in part:

As to the first question. We think it is well settled that shares of stock owned by a non-resident defendant in a foreign corporation cannot be reached by process of attachment, although the officers of the corporation are within the State, and the business of the corporation is being carried on here. The *situs* of the stock, for the purpose of attachment and execution, is the domicile of the corporation, and that place only. See Cook, Stocks & S. (3d Ed.) § 485, and cases cited; Plimpton v. Bigelow, 93 N. Y. 592; 23 Am. & Eng. Enc. Law, 632, and cases cited; Winslow v. Fletcher, 53 Conn. 394, 4 Atl. Rep. 250. A corporation can have but one legal residence, and that must be within the State or sovereignty creating it, although, by comity, it may be allowed to do business, through its officers and agents, in other jurisdictions. Chafee v. Bank, 71 Me. 514. Our statute which authorizes "the attachment of the shares of the defendant in any corporation," etc. (Judiciary Act, ch. 33, § 20), "is to be construed," as said by the court in Plimpton v. Bigelow, *supra*, concerning a similar statute of New York, "in view of the fundamental principle upon which all attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment, in order to any valid or effectual seizure under the process." See, also, Taft v. Mills, 5 R. I. 393. In the case at bar the stock in question was neither actually nor constructively in this State at the time of the attempted attachment thereof, and hence the proceeding was a nullity. And this statement is equally applicable to the attempted proceeding by trustee process or garnishment, set out in the pleadings, as to the said attachment proceeding; although we do not wish to be understood as intimating that shares of stock in a corporation can be reached in this way. In this connection, see Lowell, Stocks, § 9, and cases cited.

As to the second question. We do not think the defendant corporation had power to enact the by-law first above quoted. Section 6 of chapter 46 of the statutes of Maine, set up in the defendant's third special plea, provides that "corporations may determine by their by-laws the manner of calling and conducting meetings; the number of members that constitute a quorum; the number of votes to be given by the shareholders; the tenure of office of the several officers; the mode of voting by proxy, and of selling shares for neglect to pay assessments; and may enforce such by-laws by penalties not exceeding twenty dollars." And the rule is that where, by the provisions of the particular charter, or by a general statute relating to corporations, power is conferred upon a corporation to enact by-laws for certain specified purposes, its power of legislation is limited to the cases and objects enumerated, all others being excluded by implication. "*Expressio unius est exclusio alterius.*" See Ang. & A. Corp. (5th Ed.) § 325; Child v. Hudson's Bay Co., 2 P. Wms. 207; Railroad Co. v Kendall, 31 Me. 470; Spring Co. v. Harris, 20 Mo. 382 The defendant corporation, then, having no power to enact the by-law in question, it becomes unnecessary to consider whether or not it was a reasonable enactment, as contended by defendant's counsel.

NEGOTIABLE INSTRUMENT — PROMISSORY NOTE — ORAL AGREEMENT — BONA FIDE HOLDER.—In Thompson v. Love, decided by the Supreme Court of Arkansas, defendant, by fraud, was induced to execute his note "for value received" for worthless stock. The payee, who had orally agreed not to transfer the note, indorsed it for a valuable consideration before maturity, without recourse, to plaintiff, who had notice of the oral agreement not to transfer, but not of the fraudu-

lent character of the note. It was held, that the plaintiff was an innocent holder of the note. The following is from the opinion of the court:

The note sued on in this case, with the notes of many others, was given as part of the purchase price of the patent right of the Southern Hedge Company in 12 counties in Western Arkansas. The appellee was one of the incorporators of the Western Arkansas Hedge & Wire Fence Company, of Dardanelle. The business authorized to be transacted by the Southern Hedge Company under its patent was the planting, growing, and plashing of hedges, buying or selling territory rights or patents for the construction of hedges, with the right to buy or sell real estate. This patent right to the Southern Hedge Company was sold and transferred to the incorporators of the local company, in consideration for which these incorporators of the local company individually gave in payment their notes. We cannot conceive how the doctrine of *ultra vires*, contended for by appellee, has any application in this case. The appellee certainly had the power and the right to execute the negotiable promissory note he gave, and the only question is did the appellant, by the indorsement of it to him, become a *bona fide* holder thereof? If so, he is protected by the law merchant, notwithstanding any fraud of the original payees inducing its execution. In Burke v. Dulaney, 153 U. S. 233, 14 Sup. Ct. Rep. 816, the Supreme Court of the United States say: "The rule is settled that a negotiable instrument in the hands of an innocent purchaser for value cannot be contradicted to his prejudice by an oral agreement or understanding between the original parties variant from the terms of their written contract." To protect a holder of a commercial instrument against defenses that do not appear on the face of the instrument, it must be shown that he took it in good faith. "If he is guilty of bad faith, *mala fides*, he cannot claim to be a *bona fide* holder. It is therefore necessary to determine what constitutes such good faith as to make one a *bona fide* holder. The earlier English authorities maintained that *mala fides* in this case, as in any other legal transaction, meant participation in some fraud or other wrong. In a later case, Lord Tenterden so far modified the existing rule as to hold that one is not a *bona fide* holder who took the paper under circumstances which ought to have excited the suspicion of a prudent and careful man. This ruling was subjected to the universal criticism of both the legal and mercantile world, and the complaint of the merchants and bankers induced the court, under the lead of Lord Denman, C. J., to require proof of gross negligence to take away from one he character of a *bona fide* holder" Tied. Com. Paper, § 289. Lord Tenterden's rule was followed by Chancellor Kent, and is still the rule in some of the States, says Mr. Tiedeman. "But," he says, "the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the *bona fide* character of a holder can only be destroyed by proof of his participation in a fraudulent transfer of the instrument." *Id.*, and cases cited note 2; Hamilton v. Vought, 34 N. J. Law, 187. In our opinion there is no evidence in this case that the appellant participated in a fraudulent transfer of the note sued on, or of bad faith on his part in the purchase of it, that deprives him of the character of an innocent holder. Morton v. Noble, 15 Ind. 508; Heist v. Hart, 73 Pa. St. 286. In the case last cited it is held that a parol agreement, although made at the time of making negotiable paper, that the payee will not negotiate it and would renew it, is inadmissible to vary the effect of the paper. 1 Daniel, Neg. Inst. §§ 771, 775.

INJUNCTION TO RESTRAIN PROCEEDINGS UNDER A VOID JUDGMENT.

This topic has recently been treated incidentally in the columns of the CENTRAL LAW JOURNAL.[1] The writer wishes to submit a few suggestions merely as auxiliary thoughts on an important subject. A judgment is not of the nature of a contract,[2] and must therefore be treated, for the purposes of this discussion, as *sui generis*, not to be tested by the rules of the law of contracts, or those governing the application of equitable relief to contracts, but rather by the fundamental principles of equity in their adaptation to the exigencies of the case. The question of the jurisdiction of the chancellor to enjoin proceedings under a void judgment at law is one of extreme difficulty and surrounded by phalanx upon phalanx of closely reasoned but bitterly conflicting decisions. We may instance the opinion of the Supreme Court of Missouri, by Sherwood, J., in a case where equitable relief was sought against a judgment of a justice obtained without notice.[3] He says: "If the judgment of the justice is void, then will the execution issued thereunder be void also, and equity will not interfere to do a nugatory act. The remedy of the railway (the judgment debtor) is ample and adequate at law, and this prevents the interposition of a court of equity, as a suit could be maintained against the constable as a trespasser, and the purchaser's pretended title would be valueless. This is elementary law." Yet Mr. High says: "In cases where the judgment which it is sought to enjoin is void from want of jurisdiction arising from the want of service of process upon the defendant, the courts have manifested less reluctance in granting the desired relief than in the classes of cases already considered" (*i. e.*, where the judgment is void for want of jurisdiction, but notice has been given).[4] This position is well sus-

[1] Leading Article, "Suit in Equity to Enjoin Void Judgment, Assessment or Tax," 35 Cent. L. J. 4.
[2] Freeman, Judgments, Sec. 4.
[3] St. Louis, etc. R. R. Co. v. Reynolds, 89 Mo. 146.
[4] High, Injunctions, Sec. 229, and cases cited.

tained by the cases.[5] Respecting the language of the court above quoted, it is doubtful whether the constable could be held liable as a trespasser if the process directed to him was fair upon its face;[6] and thus another mooted question is drawn into the decision of the case, one upon which the decisions of the several appellate courts of Missouri are inharmonious.[7] It becomes apparent that the conflicting cases, which we cannot review at length here, can be studied and differentiated properly only by keeping in mind the fundamental elements of equitable relief, as they are exemplified in their original simplicity and vigor by the federal decisions. The extraordinary powers of equity cannot be invoked where there is a "plain, adequate and complete remedy" at law. This, the language of the 16th section of the Judiciary Act of 1789, is, in the language of Mr. Justice Field,[8] only "declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And it has often been adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the inhibition of the act of congress to pursue his remedy in such cases in a court of equity." Viewed in the light of this simple statement of equity doctrine, many of the cases show an extension of the injunctive power, uncalled for and entirely unnecessary. The correlative principle is thus stated by Mr. Chief Justice Fuller:[9] "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

The remedy at law must meet this requirement, and it is the peculiar province of equity to inquire into the question of fact as to whether or not it is as efficient as the remedy in equity. It is very difficult, from the common-sense standpoint, to see why a defendant in a void judgment should be compelled by equity to stand by and witness the levy and sale under the void execution, and have as his only recourse his action against the officer as a trespasser. It has been often held that such a remedy is not adequate and complete,[10] and injunction has accordingly issued. Certainly, whenever it is not apparent that the remedy at law exists, or that, if it exists that it is as efficient as the relief in equity, the chancellor should extend the injunctive protection of equity to the defendant in the void judgment, and he will by so doing be performing, not a nugatory act, but one most salutary, and in perfect accord with the beneficient principles of equity jurisprudence.

St. Louis, Mo. JAS. L. HOPKINS.

[5] Rhodes-Burford Furn. Co. v. Mattox, 135 Ind. 372; Sebring v. Joanna Heights Assn. (Pa. C. P.), 2 Pa. Dist. R. 629; Iowa Tel. Co. v. Boylan (Ia.), 52 N. W. Rep. 1122: 86 Ia. 90.

[6] St. Louis, etc. R. R. Co. v. Lowder, 59 Mo. App. 3-5, and cases cited; also, State v. Devitt, 107 Mo. 573-576.

[7] St. Louis, etc. R. R. Co. v. Lowder, *supra*.

[8] Scott v. Neely, 140 U. S. 106.

[9] Kilbourn v. Sunderland, 130 U. S. 505.

[10] High, Injunctions, Sec. 228, and cases cited.

PEDDLERS — LICENSES — INTERSTATE COMMERCE.

CITY OF SOUTH BEND V. MARTIN.

Supreme Court of Indiana, September 17, 1895.

1. One who goes from house to house with articles of commerce, there offering them for sale and delivering them as sold, is engaged in peddling, within Rev. St. 1894, § 3541, authorizing cities to restrain hawking and peddling.

2. An ordinance prohibiting peddling without a license is not an interference with interstate commerce, in the case of a person who takes about with him articles sent to him, as agent, to sell, by one manufacturing in another State, and delivers them as sales are made; and it is immaterial that the sales are on the installment plan, and that the title remains in the manufacturer till payment of the price.

MCCABE, J.: The appellant prosecuted the appellee before the mayor of said city to recover the penalty, of not less than $1, nor more than $20, provided in an ordinance with a violation of which the appellee was charged in the verified complaint filed. Said complaint charged "that the defendant, on the 12th day of September, 1894, at the city * * * aforesaid, sections Nos. 24 and 25 of Ordinance No. 938 of said city, passed by the common council thereof on the 11th day of December, 1893, and amended August, 1894, by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend by carrying, exposing, offering, and crying for sale, articles of merchandise, to-wit, rattan rocking chairs, in the public

streets and avenues of said city, without having a license for that purpose; that while so engaged the defendant sold and delivered to one Emma Wright one rattan rocking chair, for the sum of six dollars; that said articles of merchandise so sold were not newspapers nor produce nor provisions, and that said sales were not for future delivery of said chairs; that defendant is not a wholesale traveling merchant." The city recovered judgment in the mayor's court for one dollar, and the defendant appealed to the Circuit Court, where a trial resulted in a judgment for the defendant. The plaintiff appeals therefrom to this court. One of the questions presented by the record and briefs is whether the ordinance referred to is valid. That alone rescues the appeal from the exclusive jurisdiction of the appellate court. Acts 1891, p. 39; Rev. St. 1894, § 1336. The only error assigned is that the Circuit Court overruled appellant's motion for a new trial. The ground for the motion for a new trial is that the decision of the court was contrary to law and the evidence.

The only evidence in the cause was the following agreed statement of facts:

"A. H. Ordway & Co. are manufacturers of rattan chairs, residing in South Framingham, Mass., of which State they are citizens, and in which city they have their manufactory and place of business. In the prosecution of the said business they sell directly to the people of the different States, and do not sell to retail dealers in the trade. They ship their chairs from the factory to A. H. Ordway & Co., in care of their agents at different points throughout the United States. In the prosecution of their said business they employ men, who go about from town to town in Indiana and other States of the Union with the chairs, going personally from house to house, and selling the chairs on the installment plan, retaining the title in the chairs until they are fully paid for, and deliver the goods at the time the sales are made. The defendant William C. Martin was an employee of the said A. H. Ordway & Co., employed by them to travel and sell their chairs in the manner stated, upon a commission on the amount of his sales, at the time of his arrest September 13, 1894. The particular chairs which defendant was engaged in selling in South Bend, Indiana, at the time of his arrest, were shipped by the owners and manufacturers, A. H. Ordway & Co., from South Framingham, Mass., to A. H. Ordway & Co., in care of their agent at Chicago, State of Illinois, where they have a branch and repository, and there reshipped from Chicago to South Bend, Indiana. The defendant, William C. Martin, at the time of his arrest, and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city, and selling the chairs, and delivering the same at the time of sale, and was acting solely for A. H. Ordway & Co.; and the said sales were made on the installment plan, and the title retained in A. H. Ordway & Co. until same are fully paid for. The common council of the city of South Bend had enacted an ordinance, in force at the time of the arrest of the said William C. Martin, entitled 'An ordinance concerning the licensing of certain extraordinary trades and establishments.' Passed December 11, 1893; amended August 28, 1894. Section 24 of said ordinance provides as follows:

"'It shall be unlawful for any person to carry on the business of hawking and peddling within the corporate limits of South Bend, at wholesale or retail, by carrying, exposing or crying for sale within any street, avenue, alley or public square of said city, or otherwise, any article of commerce without a license from said city for that purpose: provided this section shall not apply to the sale of newspapers nor to produce and provisions nor fruit of peddlers' own raising, nor to taking orders for future delivery of any kind of goods, wares or merchandise, nor to wholesale traveling merchants and farmers who sell only retail dealers in like commodities. Any person violating any section of this ordinance shall be fined for each offense not less than one dollar nor more than twenty dollars.'

"'Sec. 25. License to hawkers and peddlers shall be signed by the mayor and countersigned by the clerk on payment of a license fee as follows: For carrying goods by hand, one dollar per day, five dollars per week, ten dollars per month and twenty dollars per year. For selling from any kind of vehicle two dollars per day, eight dollars per week, fifteen dollars per month, twenty-five dollars per year. The clerk for such services shall receive fifty cents for each license issued to be paid by the applicant.'

"'Sec. 26. No license issued under any section of this ordinance shall be transferable; nor shall any person other than the person named in the license, be permitted to use the same, nor shall any license protect any person from incurring the penalties prescribed by this ordinance except the license named in the license.'

"The defendant, William C. Martin, at the time of his arrest, was not engaged in the sale of newspapers, produce, provisions, or fruit, and was not taking orders for future delivery, and was not a wholesale traveling merchant, but was selling at retail to consumers. The defendant, * * * at the time of his arrest, had not obtained a license as required by said ordinance. The defendant was arrested, tried, convicted, and sentenced to pay a fine of * * * $1 and costs, under said ordinance, before D. B. J. Schafer, mayor of said city of South Bend, September 13, 1894. If the court should be of the opinion, upon the facts stated, that the defendant * * * was liable to pay the license fee provided by said ordinance, then judgment to be rendered for the plaintiff for one dollar ($1) and costs of suit. If the court should be of opinion that the said Martin was not liable to pay, then judgment to be entered for the defendant for costs of suit."

Subdivision 23, § 3106, Rev. St. 1881 (section 3541, Burns' Rev. St. 1894), empowers cities "to regulate the ringing of bells and crying of goods and to restrain hawking and peddling." It has been held by this court that this statutory provision empowers a city to pass an ordinance requiring a license to hawk and peddle in a city. City of Huntington v. Cheesbro, 57 Ind. 74. The ordinance involved in Graffty v. City of Rushville, 107 Ind. 502, 8 N. E. Rep. 609, imposing a penalty on "every person who peddles, hawks, sells or exhibits for sale, any goods, wares or merchandise not the growth or manufacture of Rush county, Indiana, or shall take orders for any such goods, wares or merchandise for immediate or future delivery about the streets, alleys, hotels, business houses, or at any public or private place in said city," without a license, was held void both because it violated section 23 of article 1 of the State constitution, which provides that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens," and because of its plain repugnance to the federal constitution, which commits to congress the exclusive power to regulate commerce among the several States. The provision in that ordinance that brought it in conflict with both constitutions, in the opinion of the court, was its discrimination against "any goods, wares or merchandise not the growth or manufacture of Rush county, Indiana." Graffty had been taking orders from citizens of said city for shirts, socks, and men's furnishing goods, about the streets, etc., of said city, which were not of the growth or manufacture of said Rush county. That he resided in Indianapolis, and was in the employ of Paul H. Krauss, a manufacturer and dealer in such goods, residing, and having his busniess house in the city of Indianapolis. That Graffty's manner of business was to carry samples of the different articles manufactured or sold by his employer, and exhibit them, from house to house, to individuals, not dealers, soliciting orders from each individual for such articles, and in such quantities as the individual might require or purchase. The goods thus ordered were to be delivered at a future day, by express or otherwise. He delivered no goods, nor did he carry any goods with him, except the samples. It is easy to see that, as against Graffty, this ordinance, under the facts, was an infringement of the provision quoted from the State constitution; but it is difficult to see how, under those facts, it violated any provision of the federal constitution. It is also easy to see that a case might arise, on a different state of facts, that would make the ordinance void, as to that case, because of its infringement of the federal constitution. For instance, had the manufacturer and dealer in these goods been a resident of another State, and had his business house there, his goods then would have been the legitimate subjects of interstate commerce, and Graffty would have been engaged in interstate commerce, the exclusive power to regulate which is vested by the federal constitution in the congress of the United States. But the facts in that case show that Graffty was not engaged in interstate commerce, but that he was engaged in intrastate commerce; that his commerce and trade, and by which it was charged he violated the ordinance, were entirely confined within the boundaries of the State of Indiana, the power to regulate which has never been delegated by the federal constitution to congress, but has been retained by, and belongs to, the several States. The case, however, rightly decided that the ordinance was void because of its infringement of the State constitution, but not as an infringement of the federal constitution, under the facts of that case. It will be observed that the ordinance now before us makes no discrimination, but applies to all, without regard to residence, or the place from whence the goods come.

Two questions arise under the assignment of errors, and the contention of counsel: (1) Was the business of the appellee, conducted in the manner described in the complaint and agreed facts, within the prohibition of the ordinance against hawking and peddling? (2) Was the ordinance in question a valid exercise of the power vested in the city by the statute referred to? The answer to both questions depends, to some extent, upon the answer to the question, what is hawking and peddling? Because it is that that the city is authorized to restrain, and requiring a license was held to be a restraint on such business in City of Huntington v. Cheesbro, *supra*. In Graffty v. City of Rushville, *supra*, it was said: "The extent of the power conferred upon cities by the statute, in this connection, is to restrain hawking and peddling, and any mode of selling which does not legitimately fall within these terms cannot be made unlawful by being specially described and restrained in the ordinance. Such sales and exhibitions of wares, and such orders for the future delivery of goods, and such only, as are embraced by the terms 'hawking and peddling,' may be restrained by ordinances duly passed under the power conferred by the statute above set out." We must therefore inquire and ascertain what constitutes a hawker and a peddler. This court, in the case last referred to, adopted the definition of Chief Justice Shaw in Com. v. Ober, 12 Cush. 493, which definition has been adopted by many courts,—among them, the Supreme Court of the United States, in Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367. It was said by Chief Justice Shaw that: "The leading, primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader, who has goods for sale, and sells them, in a fixed place of business. Superadded to this (though, perhaps, not essential), by a 'hawker' is generally understood one

who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish." Webster defines "peddling" as traveling about and selling small wares, and "hawking" as offering for sale in the streets by outcry. Another definition also adopted by this court in the case referred to, and by the Supreme Court of the United States in the case referred to, runs thus: "A peddler, petty chapman, or other trading person, going from town to town, or to other men's houses, and traveling, either on foot, or with horse or horses, or otherwise carrying to sell, or exposing to sale, any goods, wares, or merchandise." Rap. & L. Law Dict. tit. "Hawker." This court and the Supreme Court of the United States, in the cases mentioned, quote with approval another definition found in the various law dictionaries, showing the disfavor in which the common law held the vocation, as follows: "Hawkers. Those deceitful fellows who went from place to place buying and selling brass, pewter, and other goods and merchandise which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that, with hawks, seize their game where they can find it. * * * Hawkers and peddlers, etc., going from town to town or house to house, are now to pay a fine and duty to the king." The purpose and policy of the statute in empowering cities to pass ordinances in restraint of hawking and peddling was probably two-fold. One and the principal object to be attained was the protection and encouragement of local dealers and merchants, who are largely dependent for their patronage on their reputation for integrity and fair dealing, and their social and moral standing in the community, and who, by investing their means, providing fixed places of trade, and paying taxes on their merchandise, help to build up and maintain the city in which they reside, and contribute to the support of its schools, and other local interests and enterprises. The other was to prevent the indiscriminate invasion of the houses and places of business of citizens, and shield them from the practices of itinerant traders, of unknown repute, who may be frequently patronized by persons in order to be rid of their importunities and presence. Under these definitions of "hawking and peddling," the city was amply empowered to enact the ordinance in question. The police power vested by the statute in the city may be properly exerted to restrain all such as, by their methods of doing business, are liable to invade social order, or injuriously affect the prosperity of the city, by seeking purchasers for their wares in the homes of citizens, or in the streets or public places of a city, to the discouragement of the more legitimate methods of others, on whom the municipality is dependent for its support. In Graffty v. City of Rushville, *supra*, it was said: "Any method of selling goods, wares, or merchandise by outcry on the streets, or public places in a city, or by attracting persons to purchase goods exposed for sale at such places, by placards or signals, or by going from house to house, selling or offering goods for sale at retail to individuals not dealers in such commodities, * * * constitutes the person so selling a hawker or peddler, within the meaning of the statute. In this way we are brought to the conclusion that the appellant's method of conducting business was within the prohibition against hawking and peddling without being duly licensed." The same is true in the case now before us.

The next question is, was the ordinance in question a valid exercise of the power vested in the city by the statute? The answer to that question depends upon whether the ordinance violates or infringes any of the limitations of the constitution, State or federal. It is not claimed that it violates any provision of the State constitution, or infringes any of its provisions. This is practically conceded by the appellee. But he contends earnestly that it infringes that provision of the federal constitution which vests in congress the power to regulate commerce with foreign nations, and among the several States. It is contended that the business of the appellee, and the manner in which it was conducted, as shown by the agreed statement of the facts, made it interstate commerce, and therefore beyond the control of the State authorities. In support of this contention, appellee's counsel cite and rely on Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. Rep. 829. It was said in that case, quoting from Chief Justice Fuller in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681: "The power vested in congress 'to regulate commerce with foreign nations, and among the several States and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of the State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. Gibbons v. Ogden, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419. And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the State, unless placed there by congressional action." But the facts in that case (Brennan v. Titusville) were entirely different from those in the case at bar, though,

at first blush, they may seem to be very similar. In that case, J. A. Shephard was a manufacturer of picture frames and maker of portraits, residing in Chicago, Ill., of which State he was a citizen, and in which city he had his factory and place of business. He employed agents, who, under his direction, solicited orders for pictures and picture frames in the State of Pennsylvania, and other States of the Union, by going personally to residents and citizens of said States, and exhibiting samples,—going when necessary, from house to house. Brennan was an agent of Shephard, employed by him to travel and solicit orders for said articles, in the manner stated, upon a salary, and also upon commission upon amount of his sales. Upon receiving orders for pictures and picture frames, the agents of said Shephard forwarded the same to him, at Chicago, Ills., where the goods were made, and from there said Shephard shipped the goods to the purchasers in Titusville, Pa., by railroad, freight and express; and the price of said goods was collected and forwarded by the express companies, and sometimes by the agents, to Shephard, at Chicago, Ill. The agent, Brennan, employed by said Shephard, was engaged in conducting the business in the manner stated at the time of his arrest in said city of Titusville, Pa. There was at the time in force in said city an ordinance enacted by said city of Titusville, providing "that all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business and shall pay to said treasurer therefor the following sums, according to the time said license shall be granted;" and then follows the price of the license for the different lengths of time for which they may be granted. The penalty provided for a violation of the ordinance was a fine not exceeding $100, nor less than the amount required for a license to such person, together with 20 per cent. added, with costs of suit. The agent had not procured a license when he did the business with which he was charged. It was further said in that case, quoting from the opinion of Mr. Justice Bradley in Leloup v. Port of Mobile, 127 U. S. 640, 645, 8 Sup. Ct. Rep. 1380, that, "Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business." And further quoting in that case from the opinion of Mr. Justice Field, in Welton v. Missouri, 91 U. S. 275, 278, it was said, "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves." It was further said in the case of Brennan v. Titusville, *supra*, that: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and, if a State may lawfully exact it, it may increase the amount of the exaction, until all interstate commerce in this mode ceases to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and, to that extent, to regulate it." And, after reviewing a long line of decisions of the Supreme Court of the United States, it was said by Mr. Justice Brewer, who delivered the opinion of the court, that, "Within the reasoning of these cases, it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was therefore beyond the power of the State." For that reason the judgment of the Supreme Court of Pennsylvania, which had held the ordinance valid, was reversed. It follows, therefore, from these principles, well established by the decisions of the Supreme Court of the United States,—the court of last resort upon such questions, and whose decisions thereon are binding upon and authoritative with us,—that if the goods involved in the case now before us were the subjects of interstate commerce at the time the appellee was dealing with them, and if the appellee, in selling them as he did, was engaged in interstate commerce, then the ordinance he was charged with violating was void, at least as to him and that transaction. But it will have been observed that the facts in Brennan v. Titusville, *supra*, as before remarked, are very different from those in the case now before us. The goods in Brennan's Case, when his employment was at an end in each sale, were still in the manufacturer's possession, in another State than that in which he made the sales. His employment as a "person canvassing or soliciting within said city orders for goods," etc., was at an end, so far as the restriction in the ordinance went, when he transmitted the order for which he had canvassed, or which he had solicited, to his employer, in the other State. Therefore, in taxing his occupation, the goods were taxed, by the ordinance, before they had come into the State of Pennsylvania, and become incorporated into the mass of property in that State, and while they were in the State of Illinois. Not so under the facts in the case now before us. Before appellee's employment can begin in any sale of chairs, as shown by the agreed state of facts, such chairs must be first shipped by their owners and manufacturers, A. H. Ordway & Co., in Massachusetts, into the State of Indiana, for sale by the appellee as their agent. The chairs, in the regular course of business, as shown to have been conducted by the appellee, must reach their final destination and resting place in Indiana before appellee can have anything to do with them. After they reach such final destination, and not before, appellee's employment, which is taxed by ordinance, begins.

Whether such chairs, after their final destination is reached, are the subject of interstate commerce, is the turning point in this case, and is a very different question than that presented in Brennan v. Titusville, *supra*. There the employment of the agent ceased before the goods were shipped, even, and much longer before they reached their final destination and resting place, as to each particular sale. But the Supreme Court of the United States, more than one year later,—on March 4, 1895,—decided a case that is exactly in point, namely, Emert v. Missouri, *supra*. At page 309, 156 U. S., and page 367, 15 Sup. Ct. Rep., Mr. Justice Gray, speaking for the court, said: "The facts were agreed, that the Singer Manufacturing Company for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddlers' license, was engaged in going from place to place in Montgomery county, in the State of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account; and that he offered this machine for sale to persons at different places, and found a purchaser, and sold and delivered it to him. The Supreme Court of the State, in its opinion, understood and assumed the effect of those facts to be as follows: 'The defendant was engaged in going from place to place, selling and trying to sell sewing machines, in Montgomery county, in this State, and had been so engaged for some years. He carried the machines with him, in a wagon, and, on making a sale, delivered those sold to the purchaser. He was not only soliciting orders, but was making sales, and delivering the property sold. These acts bring him clearly within the statutory definition of a 'peddler,' and, having no license from the State, he became liable to the penalties imposed by the statute, unless for any reason, he was exempt from the operations of the law. * * * Upon any construction, it is clear that the defendant was engaged in going from place to place within the State, without a license, soliciting orders for the sale of sewing machines, having with him, in the wagon, at least one of those machines, and offering that machine for sale to various persons at different places, and that he finally sold it, and delivered it to the purchaser. * * * The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer from one State to another, and were neither interstate commerce, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic, and, so far as appears, the only goods in which he was dealing had become a part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power and to the police power of the State. The statute in question is no part of the revenue law. It makes no discrimination between the residents or products of Missouri and those of other States, and manifests no intention to interfere in any way with interstate commerce. Its object in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door." A large number of the decisions of that court upon that question are reviewed in the case last quoted from above, and quotations made therefrom. Quoting from Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, it is there said: "Coal brought in flat boats from Pittsburg to New Orleans was still afloat in the Mississippi river after its arrival, in the same boats and in the same condition in which it had been brought, and was held in order to be sold, on account of the original owners, by the boat load; yet this court unanimously decided that a tax imposed by general statutes of the State of Louisiana upon this coal was valid, and, speaking by Mr. Justice Bradley, said: 'It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.' The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce inconsistent with that perfect freedom of trade which congress has seen fit should remain undisturbed. But if, after their arrival within the State,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax, laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to." And it was further there said: "In Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592, indeed, the majority of the court held

a statute of Tennessee requiring 'all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample,' to pay a certain sum, weekly or monthly, for a license, was as applied to persons soliciting orders for goods on behalf of houses doing business in other States, unconstitutional, as inconsistent with the power of congress to regulate commerce among the several States. * * * The distinction on which the judgment proceeded is clearly brought out in the following passages of the opinion: 'As soon as the goods are in the State, and become a part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091. When goods are sent from one State to another for sale, or in consequence of a sale, they become a part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another State, and that they are not taxed by reason of being brought from another State, but only taxed in the usual way, as other goods are. *Id:* Machine Co. v. Gage, 100 U. S. 676. But to tax the sale of such goods or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself.' 'The negotiation of sales of goods which are in another State,for the purpose of introducing them into the State, is interstate commerce.' " And quoting from the opinion of Mr. Justice Field in Welton v. Missouri, 91 U. S. 275, involving a State statute, discriminating against goods from other States, it was further said, in Emert v. Missouri, *supra*, that: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation, by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."

In the case now before us, the goods as shown by the agreed state of facts, had been sent by the owners and manufacturers from one State to another—from Massachusetts to Indiana—for sale; reaching their final destination and resting place before they were sold, or offered to be sold, and before appellee's employment in connection with them commenced. His employment was taxed by the ordinance, and that was, under the authorities cited, a tax upon the goods themselves, it is true; but before such employment began the goods had reached their final destination, and place of rest, and ceased to be subjects of interstate commerce, and had become incorporated in the general mass of property in this State, and liable to be taxed as other property, there being no discrimination made in the ordinance against them as goods from another State,—they not being taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. There was no attempt in the ordinance in question, to tax the sale of goods, or the offer to sell them, before they are brought into the State. There was no negotiation of sales of goods which were in another State, for the purpose of introducing them into this State. It will have been observed that in the case we have been quoting from (Emert v. Missouri, *supra*), the Supreme Court of the United States is careful to note that, while the defendant Emert's occupation was offering for sale and selling sewing machines manufactured and owned in New Jersey, yet that there was nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time, and that his dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another. Had it been otherwise, the case would have been ruled by Brennan v. Titusville, *supra*. There is no conflict between the two cases, as appellee's counsel seems to suppose. On the contrary, the opinion in the latter case expressly mentions the former as following the rule laid down in Robbins v. Taxing Dist., *supra*, and is in harmony with the rule laid down in the case then before the court; the conclusion there reached being that the Missouri statute then involved was in no wise repugnant to the power of congress to regulate commerce among the several States, but was a valid exercise of the power of the State over persons and business within its borders. That conclusion is decisive of the question here involved, and discussed by counsel on both sides. But appellee's counsel seeks to avoid the force of that conclusion by contending that the facts agreed upon do not bring the present case within that rule, because, as he contends: "The defendant was engaged in the sale of chairs on the installment plan. When a purchaser was found, only a conditional sale was made, the title being retained in the foreign owner until some indefinite time in the future. It might never vest in the purchaser, for the reason that he might never comply with the conditions of the sale." And the further contention is that an actual sale is necessary, to bring the defendant within the rule laid down in Emert v. Missouri, *supra*, by the Supreme Court of the United States. It is a sufficient answer to that contention to say that, while that case was one where an actual sale had been made, yet no rule was there laid down that an actual sale was necessary in that or any other case, though the prosecution was for a violation of a statute providing that "no person shall deal as a peddler without a license." Whether that statute was actually violated, or not, by Emert, was not discussed or decided by the Supreme Court of the United States, because that was not a federal question, and that court has no jurisdiction on a writ of error to the Supreme Court of a State, as was the case there, to decide anything but federal questions. The ordinance here involved, however, was very different

from the Missouri statute. The ordinance prohibited hawking and peddling without a license, and, under the authorities already cited, that forbade selling and offering to sell. The Missouri statute would probably have been held by the Supreme Court of that State, had the question been presented, to require actual dealing by a peddler, to constitute a violation thereof. But the learned counsel for the appellee himself speaks of the transactions of his client, as shown in the agreed facts, as a "sale," and the persons to whom such sales were made as "a purchaser." This is significant. It indicates that the learned counsel, though deeply interested in showing that such transactions were not sales, and that the persons with whom his client had them were not purchasers, yet, with all his learning, could find no word in the English language that would so aptly and tersely express what the acts of his client meant or amounted to, or would so correctly characterize them, as the word "sale," and no word that would so correctly characterize the persons with whom his client had the transactions as the word "purchaser." The circumstance that the sales were on the installment plan, the title being retained in the foreign owner until the terms and conditions of the sale were complied with, did not wholly eliminate from the transaction all characteristics of a contract of sale. In an executed contract of sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller, whereas, in an executory contract of sale the goods remain the property of the seller till the contract is executed. 21 Am. & Eng. Enc. Law, 476, and numerous authorities there cited in note 1, among which are Strauss v. Ross, 25 Ind. 300, and Lester v. East, 49 Ind. 588. Most of the sales made by commercial travelers or drummers are mere conditional sales, yet no one thinks of denying that they are sales, the title to the property remaining in the seller until the conditions of the sale are fully complied with. And yet those transactions are correctly denominated "sales." Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest in the purchaser until the terms of the sale are complied with. Lanman v. McGregor, 94 Ind. 301; Railroad Co. v. Erwin, 84 Ind. 457. And yet no one would, in his senses, think of denying that such a transaction was a sale. If such contention were to prevail, all sales by hawkers and peddlers might escape all restraint by cities, by inserting such a provision in the contract.

It is lastly contended that the agreed facts do not show that appellee was guilty of a violation of the ordinance, because there is no statement therein "that, while so engaged, the defendant sold and delivered to one Emma Wright one rattan rocking chair, for the sum of six dollars," as was charged in the complaint. It is true that statement was in the complaint, and is not found in the agreed facts, and if that were the only charge in the complaint the trial court would have been justified in finding for the defendant. In addition to the above charge, the complaint charges "that the defendant, on the 12th day of September, 1894, at the city and county aforesaid, violated sections 24 and 25 of the ordinance (describing it), by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend, by carrying, exposing, offering and crying for sale articles of merchandise, to-wit, rattan rocking chairs, in the public streets of said city, without having a license for that purpose." Among other things, the agreed facts are that "the defendant, * * * at the time of his arrest, and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city, and selling the chairs, and delivering the same at the time of sale," etc. He could not be selling chairs without making actual sales, and if he did it by going personally from house to house in said city, selling the chairs and delivering the same, as he has agreed that he did, then he violated the ordinance, in both hawking and peddling.

The necessary conclusion, upon authority as well as upon principle, is that the ordinance in question is in no wise repugnant to the power of congress to regulate commerce among the several States, but is a valid exercise of the police power of the State, vested by the State statute in the city, over persons and business within its borders. It follows that the finding and decision of the Circuit Court were contrarry to law and the evidence, and that it erred in overruling the motion for a new trial. The judgment is reversed and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

NOTE.—The court in the principal case reviews the leading authorities upon the question as to what constitutes a peddler. In addition may be cited the very recent case of State v. Fetterer, 32 Atl. Rep. 394, wherein the Supreme Court of Errors of Connecticut hold that one who makes regular periodical trips through certain towns as agent for a wholesale confectioner, with a wagon loaded with packages of candy, calling on retail dealers only, taking orders and filling them from the wagon if he can, if not, booking them to be filled by a subsequent delivery, is not a peddler within the meaning of Public Acts Conn. 1893, May 18th, ch. 121, p. 271, which provides for licensing persons to engage in the business of an auctioneer, peddler or hawker or as a traveling itinerant purchaser of second hand goods.

A peddler in the popular signification of the word is "a small retail dealer who carrying his merchandise with him travels from house to house or from place to place, either on foot or on horseback or in a vehicle drawn by one or more animals, exposing his goods for sale and selling them." Randolph v. Yellowstone Kit, 83 Ala. 474. The distinctive feature does not consist in the mode of transportation, though one of

the statutory modes is essential to constitute a peddler, but in fact that a peddler goes from house to house or place to place, carrying his articles of merchandise with him and concurrently sells and delivers. Ballou v. State, 87 Ala. 144. The dominant idea involved in such an occupation seems to be that the individual carries his stock in trade, consisting of small wares, on foot or in a vehicle, about the country offering them for sale and then and there selling them. Stanford v. Fisher, 140 N. Y. 187, 35 N. E. Rep. 500.

A recent issue of the *American Law Register & Review* (Amer. Law Register & Review, Sept. 1895, p. 569), in an exhaustive summary of the authorities on this subject, concludes that these four elements are required to constitute a peddler: First, that he should have no fixed place of dealing, but should travel aroun l from place to place. Second, that he should carry with him the wares that he offers for sale, not merely samples thereof. Third, that he should sell them at the time when he offers them, not simply enter into an executory contract for future sale; and, fourth, that he should deliver them then and there, not merely contract to deliver them in the future.

A storekeeper who solicits orders and delivers groceries pursuant to such orders but does not sell or offer for sale any goods directly from his delivery wagon is not a peddler. Stamford v. Fisher, 140 N. Y. 187; Commonwealth v. Horn, 12 Pa. C. C. 284. A merchant tailor who exhibits samples of cloth and takes orders for suits of clothing to be made and delivered afterwards, is a manufacturer, not a peddler. Radebaugh v. Village of Plain City, 28 Weekly Law Bull., 107; and no merchant who has an established place of business and simply takes orders to be filled at that place and delivered from there is within the definition. Commonwealth v. Eichenberg, 140 Pa. St. 158.

One who sells ranges, etc., by sample and by taking orders for goods to be thereafter delivered and paid for, is not a peddler. State v. Lee, 113 N. C. 681, 18 S. E. Rep. 713. When the defendant went from house to house displaying samples carried with him in a case, and taking orders for his firm, and the firm, if it approved the orders, shipped the goods to the defendant, who delivered them, and took the cash payment, with an obligation to the firm for the balance, which was collected by the firm, is was held that the defendant was not a peddler within the statute. State v. Hoffman, 50 Mo. App. 585; *In re* Flinn, 57 Fed. Rep. 496; Olney v. Todd, 47 Ill. App. 439. Canvassing or taking orders for books, pictures, etc., is not peddling or hawking. Cerro Gordo v. Rawlings, 135 Ill. 36, 25 N. E. Rep. 1006, affirming 32 Ill. App. 215; Emmons v. Lewistown, 132 Ill. 386, 24 N. E. Rep. 58. The driver of a delivery wagon, who simply takes orders for future delivery, and then delivers the goods previously ordered, is not a peddler. Hewson v. Inhabitants of Township of Englewood, 55 N. J. L. 522, 27 Atl. Rep. 904. Nor is one who merely delivers goods previously sold by another. City of Stuart v. Cunningham, 88 Iowa, 191, 55 N. W. Rep. 311. The only recent case in contradiction of these views is Spanish Fork City v. Mortensen, 7 Utah, 33, which is without weight, so far as this point is concerned.

But if the vendor does travel from place to place, selling his goods and delivering them on the spot, he is a peddler; and as the sale takes place wholly within the limits of the State, he cannot claim that he is engaged in interstate commerce. Commonwealth v. Gardner, 133 Pa. 284. When the evidence showed that the defendants, who were butchers, and kept a meat-shop, sent out a delivery wagon in charge of an employee with meat to be delivered to fill orders previously given by their customers, but at the same time were accustomed to send out in the wagon other meat with knives for cutting it, and scales for weighing it, and that the employee in charge of the wagon was accustomed to drive from place to place soliciting business, not only from the wagon, but by going from house to house when the inmates did not see him and come out to the street, and selling to such as desired to buy from him, cutting up the meat, and weighing it out from the wagon, it was held that this constituted peddling in the employers. City of Duluth v. Krupp, 46 Minn. 435, 49 N. W. Rep. 235. So, a manufacturer of and dealer in proprietary medicines, who has a permanent manufactory any residence in one county, upon which he pays taxes, but who, during certain seasons of the year, attends the county fairs for the purpose of advertising and introducing his medicines, and publicly recommends them as a cure for certain diseases, is an itinerant vendor. Snyder v. Closson, 84 Iowa, 184; State v. Gouss, 85 Iowa, 21.

JETSAM AND FLOTSAM.

LANDLORDS V. ITINERANT AGENTS AND BICYCLE OWNERS.

Some of our legal contemporaries have recently discussed the question how far landlords control their property, and office buildings, so as to permit them to exclude itinerants and bicycles. One often sees signs in buildings warning public peddlers and agents not to enter.

A late California decision gives additional prominence to this subject. See 41 Cent. L. J. 127. The court discussed the implied invitation of the owner of the office building to enter it, just as the merchant invites customers to his store, and the physician and lawyer to his office. On the other hand, the court raised the question "Can the corridors of such buildings be treated as dedicated to the public, like the sidewalks of the streets?" "It cannot be said that those passages are to be treated as a part of the sidewalk, or as in any way dedicated to the public. The only persons who have acquired any right to the use of the halls, are those who hold such right under the title of the landlord. It may be that persons, who have received an express invitation to go to the room of a tenant, have sufficient right to permit them to complain of an interference with their passage through the halls, although it may be doubted whether it is not entirely a question between a landlord and tenant, as to the obstruction of the easement."

Should the rule be stretched so as to allow every person, who has merely the implied license of a tenant to visit him, to complain of interference with his entry by the landlord, forbidding him to enter? If it is once demanded that all kinds of commercial itinerants or peddlers may enter office buildings *ad libitum*, then such privilege might become very burdensome to both landlord and tenants.

The question when raised between landlord and tenant is less difficult when raised between the public generally and itinerants and peddlers.

It must be true in the language of the California court, that the halls of an office building cannot be treated as a part of the sidewalk, or as dedicated to

the general public without some limitation to be asserted by the landlord. Landlords of all large office buildings usually control such matters in their leases with tenants, and as to the general public, the landlord must be able to exclude general loungers or itinerants, who have no business without the invitation of the tenant.

Owing to the rapid increase of large office buildings in cities, and the number of business enterprises located therein, such questions become important, in view of the additional fact that visitors are carried up and down in elevators, which are built for the accommodation and carriage of persons, and not of property.

As to the right of introducing bicycles into these office buildings on the part of tenants, it is not unreasonable for landlords to regulate such introduction by rules which tend to protect their property. The question arose some time ago in one of the Chicago courts, whether a landlord could be permitted to refuse one of his tenants to take his bicycle to his room, either on the elevator or up the stairway. The landlord in the case under consideration was sustained as to his right to exclude bicycles. The law on this subject is not settled, and we will not risk any fixed opinion except to state that, in our opinion, the owners of office buildings must be permitted to some extent to protect the corridors and elevators against unnecessary intrusion on the part of persons who are not tenants, and who have no necessary business with them. Office buildings are not stores or hotel corridors into which people may crowd indiscriminately. All rules upon this subject must be based upon common sense and reasonableness, and the rights of the landlord in the protection of his property should be commensurate with the right of the tenant, who to some extent is interested in this question on the side of the landlord. Legitimate business visits are to the interest of the tenant; he is less interested in the annoyances of peddlers and other itinerants. If tenants ride bicycles let them be stored in the bicycle depots.—*National Corporation Reporter.*

CONSENT IN LARCENY.

The question, what constitutes consent in larceny, has again been passed upon in Great Britain. The answer has been in the air since the cases of Reg. v. Ashwell, 16 Q. B. D. 190 (1885), and Reg. v. Flowers, 16 Q. B. D. 643 (1886). In the first of these cases B gave A a sovereign, both supposing it a shilling. When A discovered the mistake, he kept the money, was convicted of larceny, and by an evenly divided court, this conviction was affirmed. Less than three months later the same court, on substantially the same facts, unanimously quashed a similar conviction in Reg. v. Flowers. These decisions were reviewed in a discussion of Consent in the Criminal Law, by Prof. J. H. Beale, Jr., 8 *Harvard Law Review*, 317, and have elsewhere excited considerable controversy; so that the recent case of Reg. v. Hehir, 29 Ir. L. T. 328, which settles the law for Ireland, is of no little interest. A £10 note was mistaken for a £1 one under circumstances similar to those of Reg. v. Ashwell, and by a vote of five to four the latter case was expressly disregarded, and a conviction quashed. This decision, coupled with Reg. v. Flowers, which, however, assumed to distinguish Reg. v. Ashwell, renders it very doubtful whether Reg. v. Ashwell would be followed even in England. The Irish court certainly seems to do less violence to any logical theory of consent.—*Harvard Law Review.*

BOOK REVIEWS.

BROWNE ON THE STATUTE OF FRAUDS.

This is the fifth edition of a work which, since its introduction to the profession in 1857, has occupied a prominent place in the literature of the law. It is generally recognized as a treatise of great merit and especial value on a subject exceedingly intricate and difficult of solution. Indeed it is the only work on the subject of the statute of frauds, written for American use, with which the profession has any intimate acquaintance, a statement which in these times of a multiplicity of text books attests its value and usefulness. This edition is by James A. Bailey with the co-operation of the author, Mr. Causten Browne. About nineteen hundred cases decided since the publication of the last edition have been added, and the whole text has been carefully revised. This work seems to have been done with the same care and ability as has characterized previous editions. It seems to us sufficient to say that no law library can be complete without this work, both because of the importance of the subject and the manner in which it has been treated. It is a handsome volume of nearly seven hundred pages, well indexed and beautifully printed and bound. Published by Little, Browne & Co., Boston.

SCHOULER'S DOMESTIC RELATIONS.

The first edition of this sterling treatise made its appearance in 1870. Its purpose was and is to furnish a clear, accurate and comprehensive analysis of the law of the domestic relations, as administered in England and the United States at the present day. That it is a work of positive merit and great value our readers do not need to be told. It has gone through five editions, and it is to-day the leading work extant on the subject of the domestic relations. The author is a well known and successful law book writer, his treatises on "Personal Property," "Bailments," "Wills," being in the libraries of most practitioners. The law, as to the relative rights and duties of Husband and Wife is constantly changing and even more chaotic than when this work was first published twenty-five years ago. For this reason, if for no other, the present edition has an especial value to the practitioner. In it are embodied the latest English and American decisions. The style of the author, his treatment of the subject are in every respect satisfactory. The notes are full and citations exhaustive. It is a book of eight hundred pages beautifully printed and bound. Published by Little, Brown & Co. Boston.

HUMORS OF THE LAW.

Edward Everett and Judge Story once met at dinner. In his post-prandial speech the judge said that "Fame rises where Everett goes," to which Mr. Everett replied: "However high my fame may rise, I am sure I will never get above one Story."

"Suppose a witness, that you yourself had called in a case, failed to testify as you believed he would, and, in fact testified the other way, what would you say?" asked an examiner.

Various emotions passed over the face of the student, who, at last, taking in the enormity of the treachery of the witness, cried out indignantly, "I should say it was misplaced confidence!"

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCORD AND SATISFACTION.—The payment of a part of a debt will in no case discharge the whole, without an agreement to release the balance, and an acceptance of the payment as an accord and satisfaction.—MARION v. HEIMBACH, Minn., 64 N. W. Rep. 386.

2. ACTION — Abatement. — One whose property has been taken on a writ of replevin against his agent or bailee cannot retake it by replevin from the plaintiff in the first action during the pendency of that action.—LARSON v. NICHOLS, Minn., 64 N. W. Rep. 553.

3. ACTION—Abatement.—An action to recover damages for conversion will not abate because of the pendency of an action theretofore brought by defendant against an officer who held under a writ of attachment the property alleged to have been converted, in which action plaintiff intervened and asserted his right to the property, as the issues in the two actions are different.—HALL v. SUSSKIND, Cal., 41 Pac. Rep. 1012.

4. ACTION — Joinder of Causes.—Causes of action for malicious prosecution and for slander may be joined in the same suit.—BIBLE v. PALMER, Tenn., 32 S. W. Rep. 249.

5. ADMINISTRATION — Claims — Priority of Vendor's Lien.—In the application of the proceeds of the sale of land of a decedent, a vendor's lien, when held with a vendor's superior title, has precedence over every other claim.—TOULLERTON v. MANCHKE, Tex., 32 S. W. Rep. 238.

6. ADMINISTRATION—Growing Crops.—Growing crops on the lands of a decedent are assets of his estate.—MCGEE v. WALKER, Mich., 64 N. W. Rep. 482.

7. ADMINISTRATION — Payment of Claims. — Rev. St. 1894, § 2534 (Rev. St. 1881, § 2378), designates the order in which claims against an estate are to be paid. Section 2541 (2385) directs the administrator to pay off claims allowed, giving preference as provided in the section above: Held, that payment by an administrator of debts in an order different from that provided is not a breach of his bond, unless a creditor of the estate or the estate has suffered by reason of such payment.—MASTERSON v. CAUBLE, Ind., 41 N. E. Rep. 477.

8. ADMIRALTY JURISDICTION—Torts.—Where a tort is committed partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the *locus* of the damage, and not the *locus* of the origin of the tort: Held, therefore, that where the tort complained of was that a laborer working in the hold of a vessel was struck and injured by a piece of lumber, sent, without warning, down through a chute, by a person working on the pier, the case was one of admiralty jurisdiction. — HERMANN v. PORT BLAKELY MILL CO., U. S. D. C. (Cal.), 69 Fed. Rep. 646.

9. ADVERSE POSSESSION. — Continuous, exclusive, peaceable, and adverse possession of land for more than 10 years is sufficient to bar a suit for the recovery of possession thereof.—PARSONS v. THOMPSON, Tex., 32 S. W. Rep. 327.

10. ADVERSE POSSESSION — Tenancy in Common.—Where one of two tenants in common quitclaimed the entire lot to parties from whom it successively passed to many others, and who went into possession, erected improvements, paid taxes, and remained there for 25 years before plaintiffs asserted any interest therein, or demanded partition thereof, and no action was brought until 9 years after said demand for partition, the original entry and subsequent possession were so adverse as to perfect defendant's title as against the other tenant in common and his grantees.—FULLER v. SWENSBERG, Mich., 64 N. W. Rep. 463.

11. APPEAL—Notice.—After judgment against a principal and two sureties on a bond, one of said sureties cannot appeal without serving notice on the other, as required by Code, § 3174, as the judgment could not be modified or reversed without affecting the rights of said other surety.—FISHER v. CHAFFEE, Iowa, 64 N. W. Rep. 662.

12. APPEAL BOND— Release of Sureties.—An agreement between the principal and obligee of an appeal bond, without knowledge of the sureties, by which the principal is induced to postpone the appeal for a given time, will discharge the sureties, though the agreement had no consideration, and the appeal might have been prosecuted after the period of postponement had expired.—MICHAEL v. BALL, Tex., 32 S. W. Rep. 238.

13. APPEALABLE ORDER—Failure to Produce Papers.—An order striking out defendant's demurrer, and denying it the right of further defense, on the ground that it was in contempt for not complying with an order of the court, is appealable after final judgment.—GLOVER v. AMERICAN CASUALTY INS. & SEC. CO., Mo., 32 S. W. Rep. 302.

14. ASSIGNMENT FOR BENEFIT OF CREDITORS—Acceptance of Trust.—Defendants made a general assignment for the benefit of creditors, and calling on T, informed him of his selection as assignee, and asked him if he would accept the trust, to which T replied "that he would like to do so, but could not answer till he saw B." The deed was then registered, but T afterwards refused to act: Held, that the deed was valid, as against attachments levied subsequent to its registration, and that equity would appoint a trustee in T's place.—FRANK v. HEINER, N. Car., 23 S. E. Rep. 42.

15. AS IGNMENT FOR BENEFIT OF CREDITORS.—Creditors.—A county treasurer who had funds on deposit with a banker who has assigned for the benefit of his creditors cannot, by identifying the money which came into the hands of the assignee as money which he deposited, claim a preference.—STEVENS v. WILLIAMS, Wis., 64 N. W. Rep. 422.

16. ASSUMPSIT FOR USURIOUS INTERE T PAID.—Where, as in this State, the statute punishes only the taker of

usurious interest, by declaring a forfeiture of all interest so contracted for or received, the person paying the same may, independently of the statutory remedy, maintain an action for money had and received, as at common law, to recover the excess so paid over the legal rate, or he may have such excess applied towards the payment of his debt.—WILSON V. SELBIE, S. Dak., 64 N. W. Rep. 537.

17. ATTACHMENT—Bond — Damages. — A statute requiring a bond in attachment, conditioned to pay "all legal costs, fees and damages," does not include counsel fees paid by defendant. — COMMONWEALTH V. MEYER, Penn., 32 Atl. Rep. 1044.

18. ATTACHMENT— Custody of Officer.— Where the sheriff, in attaching stock of farming implements, makes a full inventory thereof, but leaves them in the building where they were found, in charge of a bailee, from whom he takes a receipt, and expressly directs such bailee to hold the property until further order of court, there is a sufficient compliance with Code, § 2967, subd. 2, providing that, if the property is capable of manual delivery, "the sheriff must take it into his custody."—HAMILTON V. HARTINGER, Iowa, 64 N. W. Rep. 592.

19. ATTACHMENT—Damages.—Where an attachment suit to subject property in the possession of defendant to the payment of the debts of another, based on a charge of fraudulent concealment, terminates in favor of defendant, the latter cannot recover the attorney's fees and traveling expenses incurred by reason of the wrongful attachment.—WORTHINGTON V. MORRIS, Ky., 32 S. W. Rep. 269.

20. ATTACHMENT— Fraudulent Conveyances.— In an action for wrongful attachment by the trustee to whom the property of an insolvent firm has been conveyed to secure certain of its creditors, the petition is sufficient if it alleges that the firm executed a deed of trust to him as trustee for certain creditors, naming them, together with the amounts respectively due them; that several of the beneficiaries had accepted; and that the trustee had gone into possession, and was in possession at the time the property was levied upon.—ROCK ISLAND PLOW CO. V. HILL, Tex., 32 S. W. Rep. 242.

21. ATTORNEY AND CLIENT—Authority—Seizure upon Claim and Delivery.—An attorney at law retained and authorized to institute and prosecute an action in claim and delivery has implied authority to proceed in an orderly way, and to direct such incidental things to be done as may reasonably seem necessary, under the circumstances, to protect the interest of his client, and attain the end for which the suit was instituted. —FOX V. WILLIAM DEERING & CO., S. Dak., 64 N. W. Rep. 520.

22. BAILMENT OR SALE—Delivery.— The question as to whether there was a delivery under the terms of a contract of sale which provided for a period of trial by the vendee of the articles sold, before the parties entered into a subsequent agreement, plainly one of bailment, is for the jury.—GROSS PRINTING PRESS CO. V. JORDAN, Penn., 32 Atl. Rep. 1131.

23. BANK DEPOSITS—Transfer—Creation of Trust.—A bank depositor changed a deposit standing in his own name to one in his name in trust for his brother, but did not inform his brother of the account, stated that he did not intend to give the money to his brother, and retained possession of the bank books until after his brother's death: Held, that no trust arose in favor of the brother. —CUNNINGHAM V. DAVENPORT, N. Y., 41 N. E. Rep. 412.

24. BANKING—Power of Cashier.—Where the cashier, intrusted by its directors with its entire management, has been accustomed, in having paper rediscounted, to guaranty its payment, the bank will be estopped from denying his authority to so guaranty it.—FIRST NATIONAL BANK OF KALAMAZOO V. STONE, Mich., 64 N. W. Rep. 487.

25. BANKS AND BANKING—Lien on Deposits—Following Trust Funds.—Plaintiff deposited a stock certificate with a firm who unlawfully used it as collateral security. The money borrowed thereon was in the form of a check, which said firm deposited to its credit in defendant bank. Said firm was also indebted to defendant, which was authorized to apply to the payment of said indebtedness any moneys on deposit to the credit of said firm: Held that, as against plaintiff, defendant had the right to apply the moneys collected on the check to the firm's indebtedness, even after the firm had assigned.—HATCH V. FOURTH NAT. BANK OF CITY OF NEW YORK, N. Y., 41 N. E. Rep. 403.

26. BANKS AND BANKING—Receiver of State Bank.—Code, § 2903, provides that, on petition of either party to a civil proceeding, wherein he shows that he has a probable right or interest in the property which is the subject of the controversy, and that such property or its use is in danger of being injured, the court, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly injured, may appoint a receiver: Held, that a court of equity has jurisdiction to appoint a receiver of a State banking corporation on the petition of a stockholder.—DICKERSON V. CASS COUNTY BANK, Iowa, 64 N. W. Rep. 895.

27. BANKS AND BANKING — Voluntary Assessment.— The F National Bank suspended business for lack of funds, and was placed in charge of a bank examiner, who required that $50,000 should be raised and placed in the bank before it could resume business. The stockholders, including one B, the president, thereupon raised this sum in amounts equal to 50 per cent. of their stock, and placed it in the bank. The examiner caused entries to be made on the books indicating that this contribution was a voluntary assessment subject, after one year, to the liabilities of the bank, and permitted the bank to resume. B, at a meeting of the directors subsequently held, protested against these book entries, but afterwards signed reports in which the $50,000 was included as surplus. At the time of the advance the bank held two notes of B, and discounted another note of his a few days before the expiration of a year from the advance. Shortly after the expiration of the year, the bank again suspended payment: Held, that the advance to the bank was a voluntary assessment, and not a loan, and could not be set off by B in an action against him on the notes by the receiver of the bank.—BRODRICK V. BROWN, Cal., 69 Fed. Rep. 497.

28. BOND OF COUNTY TREASURER—Validity.—The official bond of a county treasurer, complying in all respects with the statute, except that it runs to the county commissioners and their successors in office, instead of to the county, is a valid official bond, upon which, in case of default, the county may maintain an action in its own name.—CUSTER COUNTY V. ALBIEN, S. Dak., 64 N. W. Rep. 533.

29. BUILDING AND LOAN ASSOCIATIONS — Discontinuance.—A building and loan association, which voluntarily closes its business, in violation of its charter and by-laws, requiring its continuance for 10 years unless within that time each share of $100 shall, by its earnings, reach the value of $200, forfeits its right to foreclose a mortgage given to secure the purchase of its stock or to collect monthly installments subsequently becoming due by the contract of sale.—SUMTER BUILDING & LOAN ASS'N V. WINN, S. Car., 23 S. E. Rep. 29.

30. BUILDING AND LOAN ASSOCIATIONS — Usury.—An agreement by a member of a building and loan association incorporated in a foreign State, entered into with it by him at the time of his application for a loan by the terms of which he was to pay monthly dues on stock which he was forced to take, and 6 per cent. interest on the principal of his loan, on which he was to make partial payments from month to month, the result being that by this decrease in the principal the interest would be at the rate of 500 per cent. for the last month, will not be enforced.—SOUTHERN BUILDING & LOAN ASS'N OF TENNESSEE V. HARRIS, Ky., 32 S. W. Rep. 261.

31. CARRIERS — Injuries to Passengers.—A railroad company, negligently failing to stop its train a reasonable length of time for its passengers to disembark, and to provide reasonable facilities for that purpose, is not liable for injuries sustained by a boy four years old, who, after the train had started, was put off by a passenger, where the act of such passenger was not the probable result of defendant's negligence.—TEXAS & P. RY. CO. v. BECKWORTH, Tex., 32 S. W. Rep. 347.

32. CARRIERS—Live Stock Shipment.—Where plaintiff sent employees along with a shipment of cattle, it cannot be assumed that they had authority to make a contract with a connecting line to which the cattle were delivered; it not appearing that they had authority to make the delivery, or by whom the delivery was made.—GULF, C. & S. F. RY. CO. v. WHITE, Tex., 32 S. W. Rep. 322.

33. CARRIERS OF GOODS—Liability as to Delivery.—In an action against a carrier for failure to carry and deliver goods as agreed in the bill of lading, it is a good defense that defendant delivered such goods to the rightful owner.—CLEVELAND, C., C. & ST. L. RY. CO. v. MOLINE PLOW CO., Ind., 41 N. E. Rep. 480.

34. CHATTEL MORTGAGE—Prospective Products.—An agreement creating a lien on the stock and prospective products of a new business, to secure advancements for its necessary operating expenses, is a valid chattel mortgage.—BROWN v. DAIL, N. Car., 23 S. E. Rep. 45.

35. CHATTEL MORTGAGES—Validity.—A chattel mortgage of property other than that which Civ. Code, § 2955, provides may be mortgaged, is nevertheless valid as against the mortgagor, or a purchaser from him with notice of the mortgage, though there was no delivery of the mortgaged property.—BANK OF UKIAH v. GIBSON, Cal., 41 Pac. Rep. 1008.

36. COMPROMISE—Collateral Attack.—A compromise judgment is, on collateral attack, binding against a party to the action represented by counsel who assents thereto, though such party was not present in person when the compromise was made, and the assent of counsel was unauthorized.—BIDDLE v. PIERCE, Ind., 41 N. E. Rep. 475.

37. CONFLICT OF LAWS—Sleeping Car Companies—Limiting Liabilities.—It will be presumed that the laws of any foreign State permit a sleeping car company to contract against its own negligence.—STEVENSON v. PULLMAN PALACE CAR CO., Tex., 32 S. W. Rep. 335.

38. CONSTITUTIONAL LAW.—The constitutionality of a statute cannot be considered in an action where it is not pertinent to or connected with the matter in controversy.—GILREATH v. GILLILAND, Tenn., 32 S. W. Rep. 250.

39. CONSTITUTIONAL LAW — Interstate Commerce—Licensing Itinerant Vendors.—Acts 18th Gen. Assem. ch. 75, § 10, amended by Acts 19th Gen. Assem. ch. 137, § 2, and 21st Gen. Assem. ch. 83, § 3, imposing a license on all itinerant vendors of drugs, does not, as imposing a license on articles brought in original packages from another State, violate Const. U. S. art. 1, § 8, giving congress the power to regulate commerce among the several States.—STATE v. WHEELOCK, Iowa, 64 N. W. Rep. 620.

40. CONSTITUTIONAL LAW—Repeal of Statute.—A contemporaneous construction of a constitutional provision, which has for many years been adhered to by the legislative and executive departments of the government, will not be disregarded by the courts, and in doubtful cases will generally be held conclusive.—STATE v. HOLCOMB, Neb., 64 N. W. Rep. 437.

41. CONTEMPT — Presumptions.—To sustain a conviction for contempt, it should appear that the language or conduct imputed to the accused is contemptuous *per se*, or, if it may be contemptuous or innocent according to the circumstances of the case, it should appear from the record to have been employed in its culpable sense.—HAWES v. STATE, Neb., 64 N. W. Rep. 699.

42. CONTRACTS—Assumpsit—Work and Labor Done.—Where an action on a written order accepted by defendant to pay for work performed by plaintiff on defendant's building was tried as an action in *quantum meruit* for work and materials furnished, and it was shown that defendant received and used the building after plaintiff's work was completed, plaintiff may recover as on a common count for work and labor done.—DIXON v. GRAVELY, N. Car., 23 S. E. Rep. 39.

43. CONTRACT—Breach—Damages.—Where a party to a contract is prevented by the wrongful act of the other party from completing the same, he has the choice of two remedies for obtaining redress: He may treat the contract as rescinded, and recover the value of his services, and for material furnished and money necessarily expended under the contract prior to its termination; or he may bring his action upon the contract for a breach of the same, and recover all he would have been entitled to under the terms of the contract, less the expense of completing the same. But he cannot combine the two causes of action in one; he must elect upon which cause of action he will proceed.—DAVIS v. TUBBS, S. Dak., 64 N. W. Rep. 534.

44. CONTRACTS — Collusive Bidding.—A secret contract, between persons proposing to bid upon the construction of a public work, by which their bids are to be put in, apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, is illegal, and contrary to public policy, and will not be enforced, though one of the parties to it has secured the contract for the public work, and has executed the same, and received the profits.—MCMULLAN v. HOFFMAN, U. S. C. C. (Oreg.), 69 Fed. Rep. 509.

45. CONTRACTS — Consideration.—Principle applied that where the assignor of an executory contract had failed to perform, and for this reason the contract could be avoided or rescinded by the other party, and thereupon a new agreement is made between such other party and the assignee, whereby each agrees to perform for the benefit of the other, there is sufficient consideration for such new promise of the assignee.—HUGHSON v. HARDY, Minn., 64 N. W. Rep. 389.

46. CONTRACT — Measure of Damages.—One who contracts with a mill owner to furnish men and operate the mill for cutting shingles out of timber furnished by the owner, at so much per thousand shingles turned out, may, on breach of the contract, recover as damages the prospective profits of the contract.—FELL v. NEWBERRY, Mich., 64 N. W. Rep. 474.

47. CONTRACTS — Performance.—An express repudiation of a contract by a party is a complete breach, and dispenses with the necessity of a tender of performance by the other party as a condition precedent to the maintenance of an action by him for the breach.—STOKES v. MACKEY, N. Y., 41 N. E. Rep. 496.

48. CONTRACT — Performance — Payment.—Where a party, by an express contract, undertakes to furnish materials and to perform labor, he is only entitled to payment according to its terms, and the law will not make for him a contract different from that which the parties have entered into. The implied liability arises, if at all, from the subsequent transaction or conduct of the parties; and if there is a substantial non-performance of the contract, and the party for whom the materials are furnished and labor performed refuses to accept, and does not receive or retain, any of the benefits of the contract, no such liability will arise.—MODELL TP. OF NORTON COUNTY v. KING IRON-BRIDGE CO., Kan., 41 Pac. Rep. 1059.

49. CONTRACT — Pleading and Proof.—On a petition alleging merely a special contract, and performance by the plaintiff, the plaintiff cannot recover on a *quantum meruit* for part performance.—MAYER v. VER BRYCK, Neb., 64 N. W. Rep. 691.

50. CONTRACT—Reformation.—Where a party fails to show that anything agreed upon was omitted from the writing through fraud, accident, or mistake, he is not entitled to a reformation thereof.—BRESA v. PRYNE, Iowa, 64 N. W. Rep. 669.

51. CONTRACT—Subscription.—A subscription paper to a church fund, containing an unqualified promise to pay, was read to the congregation, and the parties desiring to subscribe announced the amount, and the name and amount were placed on the list by those acting for the church, with the consent of said subscribers: Held, that defendant's subscription so obtained constituted a contract in writing.—FIRST M. E. CHURCH IN FT. MADISON v. DONNELL, Iowa, 64 N. W. Rep. 412.

52. CONVERSION—Damages.—In an action of trover for collaterals which had been pledged to the plaintiff by the defendant to secure a debt due to the former by the latter, and which the defendant had subsequently converted to his own use, the measure of damages was not necessarily the highest value of the property, for the plaintiff could in no event recover a money verdict for a larger sum than the amount of the debt secured by the collaterals; and consequently, where this debt was a promissory note payable in middling cotton, and the evidence failed entirely to show the value of such cotton at the time when and the place where the note was due and payable, the plaintiff could have no money recovery at all.—BELL v. G. OBER & SONS CO., Ga., 23 S. E. Rep. 7.

53. CORPORATE OFFICERS—Misapplication of Funds.—An action against corporate officers for mismanagement and misapplication of corporate funds may be brought by a stockholder in his own name, where the corporation itself is exclusively controlled by such officers.—SAGE v. CULVER, N. Y., 41 N. E. Rep. 513.

54. CORPORATIONS—Appropriation of Assets by Officer.—The president purchased of a corporation its nonnegotiable notes, with knowledge that the consideration therefor had failed, and that the corporation was insolvent. Afterwards he procured the adoption by the board of directors of a resolution authorizing the payment of such notes, and on obtaining a check he resigned the presidency: Held, that he was liable for the amount so received, as having obtained it by fraud.—MCLURE v. LEVY, N. Y., 41 N. E. Rep. 492.

55. CORPORATIONS—Insolvency—Trust Fund.—A corporation which is insolvent, but still retains dominion over and controls its property, does not hold it as a trust fund for the benefit of all its creditors, but may in good faith, dispose of it so as to secure or pay one creditor in preference to others.—MEYER v. AMERICAN FOLDING CHAIR CO., Mo., 32 S. W. Rep. 300.

56. CORPORATIONS—Liability.—Where certain persons subscribe for stock, and organize for the transaction of a banking business by the election of a board of directors, a president, and cashier, intending to incorporate as a bank under the general laws of this State, and thereafter pay in a part of the capital subscribed, and a regular banking business is conducted by such persons, through their officers, in the belief that they are incorporated, but there has been, in fact, no such compliance with the law concerning corporations as to make such organization even a *de facto* corporation, those interested in the bank as organizers and owners of its capital and business are liable as partners for the debts contracted by the officers of such bank in the due course of its business.—MCLENNAN v. HOPKINS, Kan., 41 Pac. Rep. 1061.

57. CORPORATIONS—Purchase of Stock.—A note of a corporation to a shareholder in payment for the purchase by the corporation of the shareholder's stock, taken with knowledge that it was in furtherance of a scheme for the sale by the corporation of its property, cannot, on the failing through of the scheme, be enforced against the corporation.—PRICE v. PINE MOUNTAIN IRON & COAL CO., Ky., 32 S. W. Rep. 267.

58. CORPORATION—Service—Validity.—Where the validity of service on a corporation is denied on the ground that it was made on one not an officer of the corporation, evidence that such person acted as secretary with the knowledge of the other officers, and was appointed by the directors to fill a vacancy in that office prior to such service, is sufficient to sustain the service.—PERRY DISTRICT FAIR SOC. v. ZENOR, Iowa, 64 N. W. Rep. 598.

59. CORPORATION — Subscription. — A corporation formed for the "purpose of producing electricity and power" cannot maintain an action on a subscription to a corporation to be formed "for the purpose of furnishing the incandescent system of electric lighting."—MARYSVILLE ELECTRIC LIGHT & POWER CO. v. JOHNSON, Cal., 41 Pac. Rep. 1016.

60. CORPORATION AS SUCCESSOR OF PARTNERSHIP.—Where a partnership engaged in a general mercantile business, in straitened and failing circumstances, incorporated, and the assets and business of the partnership were transferred or assigned to the corporation, and appropriated to its objects and purposes, the business of the partnership being continued by the corporation, the corporation was presumptively liable for the partnership debts.—REED BROS. CO. v. FIRST NAT. BANK OF WEEPING WATER, Neb., 64 N. W. Rep. 701.

61. COURTS—Holidays.—Where a cause in a justice's court is adjourned to a day afterwards proclaimed by the governor and president as Thanksgiving day, a judgment therein rendered on the next day, pursuant to the terms of a continuance ordered on Thanksgiving day, is void.—MILWAUKEE HARVESTER CO. v. TEASDALE, Wis., 64 N. W. Rep. 422.

62. CRIMINAL EVIDENCE — Dying Declarations.—The declaration of an injured person—who subsequently dies from such injury—as to the cause of his injury, though made out of the presence of the party accused of inflicting such injury, and made under such circumstances as not to be admissible as the dying declaration of the deceased, is nevertheless competent evidence, as part of the *res gestæ*, provided the declaration was made so near the time of the infliction of the injury, and under such circumstances, as to raise the presumption that it is an unpremeditated explanation thereof.—COLLINS v. STATE, Neb., 64 N. W. Rep. 432.

63. CRIMINAL EVIDENCE — Manslaughter.—Testimony that some time before the homicide defendant stated that the next time he shot he would not shoot to scare, but to kill, is admissible, in view of his defense that it was accidental, and that he fired merely to scare, though at the time of the remark he did not have deceased in mind.—STATE v. WINDAHL, Iowa, 64 N. W. Rep. 420.

64. CRIMINAL EVIDENCE — Rape. — On the trial of a father for rape of his daughter, evidence of prior rapes is admissible to account for there having been no outcry, and to explain the absence of laceration.—PEOPLE v. FULTZ, Cal., 41 Pac. Rep. 1040.

65. CRIMINAL LAW—Disorderly House—Indictment.—It is not necessary that the affidavit upon which a prosecution for keeping a house of prostitution is based should contain any description of the realty on which the house is situated.—JOHNSON v. STATE, Ind., 41 N. E. Rep. 550.

66. CRIMINAL LAW — Embezzlement by Sheriff.—A sheriff is an officer elected to an office of public trust in this State, and for the conversion to his own use of any moneys that shall come into his hands by virtue of his office may be prosecuted for embezzlement, under section 121 of the Criminal Code.—CONLEY v. STATE, Neb. 64 N. W. Rep. 708.

67. CRIMINAL LAW—Evidence—Other Crimes.—Where the homicide was committed at a polling place during an affray between political factions to which defendant and decedent, respectively, belonged, evidence that defendant was procuring persons to vote unlawfully is admissible, where it appears that he was highly interested in the election; that, in furtherance of the interest of his party, he associated himself with a number of men for the purpose of depositing illegal ballots; and that he went to the polls armed for the purpose of overcoming any resistance that might be offered him.—PEOPLE v. SHEA, N. Y., 41 N. E. Rep. 505.

68. CRIMINAL LAW—False Pretenses.—An information for obtaining money by false pretenses negatives defendant's ignorance of the falsity of the representa-

tions, by alleging that he "did designedly falsely represent and pretend" that he had received a subscription for a certain amount from a certain person with payment in full thereof from him.—PEOPLE v. LENNOX, Mich., 64 N. W. Rep. 488.

69. CRIMINAL LAW—Larceny—Possession of.—Where defendant explained his possession of stolen hogs by stating that he was assisting another to sell them, not knowing them to have been stolen, his defense was sufficiently covered by an instruction that "if defendant assisted in driving the hogs to town, and disposing of them, not knowing the same to have been stolen, then he would not be guilty of larceny."—STATE v. CROSS, Iowa, 64 N. W. Rep. 614.

70. CRIMINAL LAW — Murder and Manslaughter.—Defendant was tried for murder, in killing one of two persons who attempted to arrest him without a warrant, and when there was no charge against him,—probably mistaking him for another. The court, at defendant's request, charged that if such were the case, and the killing was done while resisting such arrest, it would be, not murder, but manslaughter, but added that if the killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose, it would still be murder: Held, that the modification was erroneous, as permitting the jury to return a verdict of guilty of murder merely because of the manner of the killing, even if they believed that otherwise the case was one of manslaughter only, whereas the proper inquiry was whether, at the time of the shooting, such circumstances were present, taking them all together,—including the mode of killing,—as made it a case of manslaughter, and not of murder.—BROWN v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 29.

71. CRIMINAL LAW — Murder — Premeditation.—On a trial for murder, there was sufficient evidence of premeditation to sustain a conviction of murder in the first degree, where it appeared that the parties quarreled, and decedent applied approbrious epithets to defendant, and struck him in the face; that defendant then went away, and returned between 5 and 15 minutes later with a pistol, and shot deceased,—the time between the quarrel and the shooting being sufficient for defendant's passions to cool.—PEOPLE v. KERRIGAN, N. Y., 41 N. E. Rep. 494.

72. CRIMINAL LAW — Obstructing Railroad Track—Drunkenness.—Drunkenness is no defense on prosecution for a crime, though admissible in evidence in mitigation of the offense.—CONLEY v. COMMONWEALTH, Ky., 32 S. W. Rep. 285.

73. CRIMINAL LAW—Prosecution for Defacing Jail.—A prisoner who, while confined in a county jail, defaced the wall of his cage, by making a hole therein with an iron instrument, may be convicted under Code Mill. & V. § 5403, subsec. 1, making it a misdemeanor to wantonly deface or disfigure any building belonging to the county.—ALLGOOD v. STATE, Tenn., 32 S. W. Rep. 308.

74. CRIMINAL LAW — Resisting Arrest.—On a trial for resisting an officer, evidence that defendant, when the arrest was attempted, drew a revolver, and said that he would shoot the officer before he would go with him, sufficiently shows actual resistance.—STATE v. SEERY, Iowa, 64 N. W. Rep. 631.

75. CRIMINAL PRACTICE—Adultery—Indictment.—Under Code, § 4008, declaring that "no prosecution for adultery can be commenced but on the complaint of the husband or wife," the indictment need not show that the prosecution was so commenced, but such fact may be shown without any averment; the provision not prescribing an element of the crime, but limiting the authority to punish it.—STATE v. ANDREWS, Iowa, 64 N. W. Rep. 404.

76. CRIMINAL PRACTICE — Duplicity — Burglary.—An indictment for burglary, under Code, § 3891, charging that defendant broke and entered with intent to commit an assault, and that, after having entered, he committed the assault, is not bad for duplicity, though Code, § 4800, provides that an indictment shall charge but one offense.—STATE v. PHIPPS, Iowa, 64 N. W. Rep. 410.

77. CRIMINAL PRACTICE — Indictment against Accessory.—Though the distinctions between accessories before the fact and principals are abolished, an indictment first setting out the guilt of the principal offender, and then charging that, "before the commission of said felony, defendant did" "counsel, aid, incite, and procure" said principal to commit the felony, is unobjectionable.—STATE v. GLEIM, Mont., 41 Pac. Rep. 998.

78. CRIMINAL PRACTICE — Waiving Arraignment.—Where a criminal case was set for trial several days before by consent of both parties, and both parties subpœnæd witnesses accordingly, and the trial actually commenced, defendant will be deemed to have waived his right of arraignment.—STATE v. THOMPSON, Iowa, 64 N. W. Rep. 419.

79. DECEIT — Fraudulent Concealment.—In an action against the president of a corporation for deceit in the sale of corporate bonds, the fact that defendant, in furnishing a statement of the assets and liabilities to the purchaser, omitted a certain claim against the company, does not amount to fraudulent concealment, where it appears that defendant and the company believed the claim to be invalid, and were so advised by counsel.—KOUNTZE v. KENNEDY, N. Y., 41 N. E. Rep. 414.

80. DEED — Construction.—The owner of several mill privileges on a stream, who maintained on land, not a part of any privilege, a reservoir dam, essential to the reasonable enjoyment of each privilege, conveyed one of the privileges, with all water rights and privileges thereto belonging, the grantee agreeing to pay one-fifth of the damage for the overflow of lands caused by the reservoir dam: Held, that the deed conveyed, as part of the privilege, the right to the use and benefit of the dam.—WHITTENTON MANUF'G CO. v. STAPLES, Mass., 41 N. E. Rep. 441.

81. DEED—Mistake—Correction.—Where both parties to a deed intended that there should be a conveyance of a certain number of acres to satisfy a certain debt, but by mistake of both, a greater number, of much greater value, is included, correction will be granted, against one who took a deed from the grantee knowing the facts and that correction was to be applied for.—YARZOMBECK v. GRIER, Tex., 32 S. W. Rep. 236.

82. DEED OF TRUST—Possession by Grantor.—A deed of trust of a stock of merchandise, reciting that if the debtor "shall purchase other goods for said stock this deed of trust is to include them also," and that, if the debtor should pay the debts within six months, then the deed to be void, but, if not, then the trustee shall sell the property to the highest bidder, is not fraudulent on its face as retaining in the grantor, by implication, possession and power to sell.—REEVES v. JOHN CARHART v. JOHN, Tenn., 32 S. W. Rep. 312.

83. DESCENT AND DISTRIBUTION—Advancements—Evidence.—On an issue as to whether payment by a father of the son's debts created an advancement, or a debt merely, statements of the father made to a third person when the transaction took place that he would keep the notes given him by his son to show that the son had received that much out of the estate are admissible as *res gestæ*.—WEST v. BECK, Iowa, 64 N. W. Rep. 599.

84. DESCENT AND DISTRIBUTION—Heirs of Aliens.—Under Acts 22d Gen. Assem. ch. 85, declaring that nonresident aliens cannot acquire title to or hold any lands, except that the widow and heirs of aliens who have acquired lands may hold them by devise or descent for 10 years, the widow and heirs may hold for such period without reference to whether or not they are aliens or residents.—EASTON v. HUOTT, Iowa, 64 N. W. Rep. 408.

85. DESCENT AND DISTRIBUTION—Liability of Heirs.—Section 3254, Comp. Laws, does not create a new and independent cause of action against heirs, but simply declares a remedy which may be pursued upon a claim

upon the covenant or agreement of the ancestor. If the heir has succeeded to real property which, as assets of the estate, should be subject to claims against the ancestor on account of such broken covenant or agreement, then the heir so taking such real estate shall be liable to the extent of its value "in the cases and in the manner prescribed by law."—WOODS v. ELY, S. Dak., 64 N. W. Rep. 531.

86. DIVORCE—Adultery.—Evidence that defendant's wife was in the parlor with a man, and refused admission to a visitor, and that said visitor saw the man pass through a bedroom, and that on another occasion a witness saw a man in the house with defendant's wife, who "acted like he was at home," is insufficient to establish adultery, in an action for divorce.—BURNEY v. BURNEY, Tex., 32 S. W. Rep. 328.

87. DIVORCE—Homestead—Fraudulent Conveyance.—Where a husband, when in default on his official bond, conveys land to his divorced wife, as alimony allowed by a decree of divorce *a mensa et thoro*, and the conveyance is confirmed by the court, the wife, whether she accepted with knowledge of the fraud, or not, is entitled, if she survives her husband, to a homestead in the land conveyed.—HOWELL v. THOMPSON, Tenn., 32 S. W. Rep. 309.

88. DOWER—Assignment.—Where a tract of land, exclusive of the mortgage on it, is valued as one third of the estate of a decedent, and assigned as dower, the doweress is bound to pay one-third of the interest on the mortgage debt.—HODGES v. PHINNEY, Mich., 64 N. W. Rep. 477.

89. DOWER—Devise of Life Estate.—Where a will devises a life estate in land to a wife, with remainder over to another, and does not prohibit the taking of dower, or provide that such devise is in lieu of dower, the wife, on death of the husband, is entitled both to take under the will and to her dower right in the land.—HUNTER v. HUNTER, Iowa, 64 N. W. Rep. 656.

90. EJECTMENT. — A mortgagor cannot maintain ejectment against his mortgagee in possession until the debt is paid.—HILDRETH v. JAMES, Cal., 41 Pac. Rep. 1038.

91. EJECTMENT—Complaint — Dedication.—Held, the complainant does not allege a common-law dedication of a public street at the point in question, and defendants' objection to the complaint should have been sustained.—VILLAGE OF BENSON v. ST. PAUL, M. & M. RY. CO., Minn., 64 N. W. Rep. 893.

92. ELECTIONS—Names of Candidates—Constitutional Law.—Act March 14, 1895, prohibiting the printing on the official ballot of the name of a candidate receiving the nomination of two or more parties in more than one column, is a valid exercise of the power of the legislature (Const. art. 7, § 6) "to pass laws to preserve the purity of elections and guard against abuses of the elective franchise." — TODD v. BOARD OF ELECTION COM'RS OF KALAMAZOO, CALHOUN, BRANCH, HILLSDALE, AND EATON COUNTIES, Mich., 64 N. W. Rep. 496.

93. ELECTIONS AND VOTERS—Resident—Seminary of Learning.—Under Const. art. 2, § 3, providing that no person can gain or lose his residence as a voter by his presence or absence as a student at a seminary, the intent to change the legal residence must be shown by acts independent of a person's presence as a student to entitle him to vote in the new locality.—IN RE GARVEY, N. Y., 41 N. E. Rep. 439.

94. EMINENT DOMAIN—Condemnation Proceedings.—Where the fee of lots abutting a public street extends to the center of the street, a petition by a railroad company with a track on one side of such street asking for the condemnation of the lots, describing them by lot, block, and plat adjacent and contiguous to its track on such side, is not bad for ambiguity of description.—CINCINNATI, S. & M. R. CO. v. BAY CITY & B. C. R. Co., Mich., 64 N. W. Rep. 471.

95. EMINENT DOMAIN — Payment of Price.—Where a railroad company condemns land, title thereto vests only upon payment into court, or to the parties.—JONES v. MILLER, Va., 23 S. E. Rep. 35.

96. EQUITABLE RELIEF.—In an action on a duebill, defendant asked to have the instrument reformed so as to show that he was to pay said bill only in case he had the amount thereof in his hands after he procured a certain loan for plaintiff, and alleged that he did not procure the loan: Held, there was no error in refusing to transfer the cause to the equity side of the docket, as the facts that would reform the instrument would defeat a recovery on it.—SMITH v. GRISWOLD, Iowa, 64 N. W. Rep. 624.

97. EQUITY — Marshaling Assets.—Where one creditor has a landlord's lien on two funds of his debtor, and another creditor has an attachment lien on only one of such funds, the former must first exhaust his remedy against the fund on which the latter has no lien.—WAHRMUND v. EDGEWOOD DISTILLING CO., Tex., 32 S. W. Rep. 227.

98. ESTOPPEL BY REPRESENTATIONS. — One S, the owner of land against which a judgment was an apparent lien, represented to M that the judgment was a valid lien, and that he would pay the amount due thereon. M, relying upon such representation, purchased the judgment: Held, that S is estopped from asserting against M that the judgment is not a lien.—VIERGUTZ v. AULTMAN, MILLER & CO., Neb., 64 N. W. Rep. 693.

99. EVIDENCE—Attorney and Client—Privileged Communications.—On an issue as to whether an agreement was made, at the time of the execution of a mortgage securing several debts, that its proceeds should be applied first to the payment of a specific debt, testimony of the attorney who drew up the mortgage as to the conversation between the parties at the time is competent, the matter not being privileged.—WYLAND v. GRIFFITH, Iowa, 64 N. W. Rep. 673.

100. EVIDENCE—Best and Secondary.—On an issue as to fraud in the sale to defendant of a patent right, pictures from catalogues, to show that articles of the kind the patent right for which was sold to defentant were made and sold by others than the patentee, are incompetent, as not being the best evidence.—PERKINS v. BUAAS, Tex., 32 S. W. Rep. 240.

101. EVIDENCE — Competency—Waiver.—A party who asks his adversary to offer in evidence a written instrument, of doubtful competency, cannot be heard to urge in this court, when the instrument was immediately offered, that it should have been excluded as incompetent.—SMITH v. BROWN, Neb., 64 N. W. Rep. 714.

102. EVIDENCE — Records — Presumption. — The indorsement by the clerk on a judgment abstract that it is "duly recorded" raises the presumption that it was filed and immediately recorded in the judgment record, and that the day and hour of its record was therein noted, as required by Rev. St. art. 3157.—GUNTER v. BUCKLER, Tex., 32 S. W. Rep. 229.

103. EXECUTION — Exemptions—Abstract Books.—An abstracter of titles is not a "mechanic," within Code 1873, § 3072, exempting from execution the proper tools, instruments, or books of a mechanic. — TYLER v. COULTHARD, Iowa, 64 N. W. Rep. 681.

104. EXECUTION — Injunction. — Where land is conveyed as security for an agreement to support the grantee during life, the levy of an execution against the grantee on such land will be enjoined.—EHERKE v. HECHT, Iowa, 64 N. W. Rep. 652.

105. EXECUTION SALE—Appraisement.—Under Code, § 3100, providing that "personal property levied upon and advertised for sale on execution must be appraised before sale," etc., such appraisement cannot be waived. — MINNEAPOLIS THRESHING MACHINE CO. v. BECK, Iowa, 64 N. W. Rep. 687.

106. EXPERT TESTIMONY — Evidence of Medical Expert.—It is not competent for a medical expert to give in evidence an opinion as to the cause of a person's physical condition or injuries, based in part upon in-

formation which he has derived from private conversations with a third party.—MILLER v. ST. PAUL CITY R. Co., Minn., 64 N. W. Rep. 554.

107. FEDERAL COURTS—Actions by National Bank Receivers.—The Federal courts have jurisdiction of actions brought by the receiver of an insolvent national bank to realize its assets, irrespective of the citizenship of the parties; and it is immaterial to such jurisdiction whether the action is brought in the receiver's own name, as receiver, or by him in the name of the bank.—LINN COUNTY NAT. BANK v. CRAWFORD, U. S. C. C. (Oreg.), 69 Fed. Rep. 582.

108. FEDERAL COURTS — Conclusiveness of State Decisions.—A single verdict and judgment in ejectment in Pennsylvania not being conclusive in the State courts, a decision by the Supreme court of the State upon the construction of a will, in a first ejectment suit, is not conclusive in a Federal court, but is entitled to peculiar regard as a precedent.—BARBER v. PITTSBURGH, FT. W. & C. RY. CO., U. S. C. C. (Penn.), 69 Fed. Rep. 501.

109. FEDERAL OFFENSE—Indictment.—An indictment which charges that the defendant did aid in buying, receiving, and selling a draft, "knowing that said draft had been stolen and embezzled," is insufficient, under Rev. St. § 5470, which imposes a penalty for aiding in buying or receiving articles of value stolen or embezzled from the mail, since it fails to allege any offense; the acts of stealing and embezzling being distinct, and inconsistent with each other.—UNITED STATES v. THOMAS, U. S. D. C. (Cal.), 69 Fed. Rep. 588.

110. FORCIBLE ENTRY AND DETAINER—Possession.—Where one placed in actual possession of property by the owner closes it up, and remains temporarily absent, the actual possession with which he is invested continues, so as to support an action of forcible entry and detainer by such person against one wrongfully taking possession during such temporary absence.—LEWIS v. YOAKUM, Tex., 32 S. W. Rep. 287.

111. FRAUDS, STATUTE OF — Contracts Relating to Land.—Where plaintiff had performed labor for deceased in consideration of an oral promise by the latter to convey to her by will or otherwise the farm upon which they lived, that contract, while void as being within the statute, may be employed by plaintiff as a means of determining the amount of her recovery on a *quantum meruit* against the estate.—IN RE WILLIAMS' ESTATE, Mich., 64 N. W. Rep. 490.

112. FRAUDS, ST TUTE OF — Sufficiency of Memorandum.—A letter from an agent to his principal conveying A's offer to purchase land of the principal, and a letter from the principal to the agent accepting such offer, constitute a sufficient memorandum of the contract of sale to satisfy the statute of frauds.—SINGLETON v. HILL, Wis., 64 N. W. Rep. 588.

113. FRAUDULENT CONVEYANCES.—An assignee for the benefit of creditors may maintain an action to set aside a fraudulent conveyance made by his grantor before the execution of the deed of assignment.—MEHLHOP v. ELLSWORTH, Iowa, 64 N. W. Rep. 638.

114. FRAUDULENT CONVEYANCE—Change of Possession.—The failure of a vendee of chattels to take possession thereof does not render the sale conclusively void as against creditors. It merely casts upon the vendee the burden of proving his good faith.—POWELL v. YEAZEL, Neb., 64 N. W. Rep. 695.

115. FRAUDULENT CONVEYANCES — Deed by Husband to Wife.—A wife invested her money in a partnership in which she was not a member, and her husband subsequently withdrew a sum of money from such firm: Held that, in absence of evidence that the husband promised to repay the money to the wife, the relation of debtor and creditor arose between the husband and the firm, and not between the husband and wife, so that a deed by the husband to the wife in consideration of such debt was void as to the husband's creditors.—TYLER v. BUDD, Iowa, 64 N. W. Rep. 679.

116. FRAUDULENT CONVEYANCE — Evidence.—A husband conveyed a tract of land to his wife, which conveyance was attacked by his creditors. The evidence was conflicting, but the preponderance was against the good faith of the transaction: Held, that the deed should be set aside.—NOYES v. CARTER, Va., 28 S. E. Rep. 1.

117. FRAUDULENT CONVEYANCE — Evidence.—Plaintiff in ejectment having shown paper title, judgment for him will not be reversed as against evidence merely because defendant, who claimed under execution sale on judgment against plaintiff's grantor, alleged that the conveyance to plaintiff was fraudulent, and because plaintiff was a son-in-law of the grantor, and did not testify as to the *bona fides* of the conveyance.—KERSTNER v. VORWEG, Mo., 32 S. W. Rep. 298.

118. FRAUDULENT CONVEYANCES — Evidence.—In an action against a mother and son to subject land conveyed to them jointly to the payment of a deficiency judgment against the father and mother, there was evidence that the mother held the title as security for an agreement of the son to support herself and husband, created by a transfer to him, by mesne conveyances, through other brothers, of personal property which, after plaintiff's judgment, the parents conveyed to one of their sons pursuant to such agreement; that the first son paid off a chattel mortgage on the personal property; that neither father nor mother contributed to the purchase price of the land: Held, that plaintiff was not entitled to relief.—HECHT v. EHERKE, Iowa, 64 N. W. Rep. 650.

119. FRAUDULENT CONVEYANCES—Evidence of Fraud.—Declarations by an insolvent, after an alleged fraudulent sale of his property, that he did not have any property, that the property conveyed belonged to his father (the vendee), and that he intended to fight his creditors with their own money, did not impeach the sale.—EVANS v. BOYLE, Iowa, 64 N. W. Rep. 619.

120. FRAUDULENT MORTGAGE—Evidence.—Where, in an action of attachment against one who recently purchased the entire partnership interest, for rent on a store used in the business, one intervenes claiming the goods under a mortgage from defendant, the latter, as witness for plaintiff, may be asked whether it was a firm or individual debt that he owed intervener.—BUSSARD v. BULLITT, Iowa, 64 N. W. Rep. 658.

121. GAMBLING—Recovery of Money Lost.—A complaint alleging that defendants induced plaintiff to visit their gambling place, where he lost a certain amount at gaming, and subsequently alleging that he lost the money to defendants, is bad, it being uncertain whether the cause of action attempted to be stated is under Gen. St. ch. 47, art. 1, § 2, giving a loser right to recover of the winner, or under section 9, giving one who loses at a gambling place right of recovery against one who induced him to visit the place.—WEMHOFF v. RUTHERFORD, Ky., 32 S. W. Rep. 288.

122. GIFT—Validity.—Where a husband and wife take, and raise as their own, another's child, and the child, on reaching 21 years of age, receives a legacy of money by will from the husband, a gift of this money—her entire estate—by the child to the wife, without power of revocation, made freely without advice of others or under influence of the donee, will be valid where the tenderest affection existed between them, and the donee had always cared for the donor, who fully understood the transaction. — COUCHMAN'S ADM'R v. COUCHMAN, Ky., 32 S. W. Rep. 283.

123. GIFT CAUSA MORTIS—Mental Competency.—The same degree of mental competency is required to make a gift *causa mortis* as is required to make a will.—SASS v. MCCORMACK, Minn., 64 N. W. Rep. 885.

124. GUARANTY—Notification of Acceptance.—N, an Iowa merchant, having been refused credit by complainants in Chicago, procured from defendant a letter addressed to them, and offering to guaranty payment of such purchases as N might make for his fall and winter trade. On the strength of this letter, plaintiffs sold N goods, and, on the same day, wrote to defendant, acknowledging the receipt of his letter "guaranty-

ing whatever N may purchase of us for his fall and winter stock," and saying "His purchases up to this time amount to $3,890.50, which we are getting ready for shipment:" Held that, in view of the situation of the parties, this letter was a valid notice of acceptance of the offer of guaranty, so as to make the guarantor liable for the amount of the purchases.—HART v. MINCHEN, U. S. C. C. (Iowa), 69 Fed. Rep. 520.

125. GUARANTY OF INSURANCE.—Where an insurance policy is issued by one company with payment guaranteed by another, action may be brought against both on the policy as insurers, without alleging or settling out the contract of guaranty.—KNOXVILLE FIRE INS. CO. v. AVERY, Tenn., 32 S. W. Rep. 356.

126. HOMESTEAD—Abandonment.—Where defendant, whose wife was confined in an insane asylum, had his personal property stored in his dwelling, slept there part of the time, and took his meals at another place, without intending to abandon his homestead, he will not be held to have abandoned it.—CENTRAL KENTUCKY LUNATIC ASYLUM v. CRAVEN, Ky., 32 S. W. Rep. 291.

127. HOMESTEAD—Mortgages—Renewal.—Where the owner of a homestead which is subject to a mortgage given by him to secure the purchase money, in order to procure an extension of time to pay the debt, gives new notes therefor and a new mortgage on the land, the new notes and mortgage did not create a new incumbrance, but simply changed the form of the old incumbrances, and the lien on the homestead is not defeated by the fact that the mortgagors did not join in the new mortgage.—VAN SANDT v. ALVIS, Cal., 41 Pac. Rep. 1014.

128. HUSBAND AND WIFE—Action for Personal Injuries.—In an action brought by the husband to recover damages arising from loss of services of his wife, which, it is alleged, arose from certain injuries received by her through the negligence and carelessness of a railroad company, the petition must not only allege the marital relation, but also such other facts as indicate that at the time of the injury the relations of the plaintiff and his wife were such as to entitle him to her services.—ATCHISON, ETC. R. CO. v. DICKEY, Kan., 41 Pac. Rep. 1070.

129. HUSBAND AND WIFE — Advancements by Wife.—Where a wife permits the husband to expend her money for the support of the family and in his business, without any contract for its repayment, she cannot, in the absence of an express agreement, recover the amount so advanced.—HAYWARD v. JACKSON, Iowa, 64 N. W. Rep. 667.

130. ILLEGA FISHING—Nets.—Laws 1889, Act No. 111, § 5, declaring it unlawful to take or catch or attempt to take or catch fish with nets, is not violated by one who sets nets for turtles, with openings for fish to escape, though fish are accidentally imprisoned therein; they being returned alive, so far as possible, to the water.—PEOPLE v. DEREMO, Mich., 64 N. W. Rep. 489.

131. INJUNCTION—Nuisance.—The operation of a machine and blacksmith shop devoted to boat repairing, in a neighborhood otherwise given up to costly residences, established after the character of the locality as a residence district had been determined, and in the face of protests, will be enjoined.—MCMORRAN v. FITZGERALD, Mich., 64 N. W. Rep. 569.

132. INJUNCTION — Sale Pending Suit — Easements.—The easements of a property owner in the street on which his property abuts are appurtenant to the land, and cannot, on sale of the property, be reserved to the vendor, so as to enable him to enjoin the commission of trespass thereon.—PEGRAM v. NEW YORK EL. R. CO., N. Y., 41 N. E. Rep. 424.

133. INJUNCTION PENDING SPECIFIC PERFORMANCE.—Pending a suit for specific performance, it was error to make an order upon an unverified motion, without the introduction of any evidence or the filing of a bond, enjoining defendants from interfering with plaintiff's possession of the land in controversy.—PENDLETON v. LAUB, Iowa, 64 N. W. Rep. 653.

134. INSOLVENT BANK — Liability of Directors.—Directors of a national bank, who on its suspension issue a circular declaring the solvency of the bank, and that they hope to reopen within 60 days, and authorize the bank officers to receive money on special deposit, and keep it in the vaults of the bank, subject only to the check of the depositor, and subsequently, on the appointment of a receiver for the bank, turn over to him deposits made pursuant to the circular, are personally liable to the depositors for the amount of such deposits.—MILLER v. HOWARD, Tenn., 32 S. W. Rep. 306.

135. INSURANCE — Arbitration.—Where a policy provided that differences as to the amount of loss should, at the "written request of either party," be submitted to arbitration, and that no action should be brought until after the award, arbitration, in the absence of a request therefor, was not a condition precedent to an action.—DAVIS v. ANCHOR MUT. FIRE INS. CO., Iowa, 64 N. W. Rep. 687.

136. INSURANCE—Condition of Policy.—Defendant, in an action for insurance on a stock of goods, to sustain the defense of a breach by plaintiff of a stipulation requiring him to keep the last inventory of his business in a fireproof safe "at night and at all times when the store is not actually open for business," must prove that the fire occurred at a time mentioned in the stipulation.—ALLEMANIA FIRE INS. CO. v. FRED, Tex., 32 S. W. Rep. 243.

137. INSURANCE—Construction of Policy.—A clause in a fire insurance policy, taken out by a corporation, providing that the policy should be payable to a third person "as his interest may appear at the time," does not refer to the interest of the appointee in the property itself, but to his interest as creditor, or otherwise, of the corporation.—DONALDSON v. SUN MUT. INS. CO., Tenn., 32 S. W. Rep. 251.

138. INSURANCE — Pleading — Waiver.—A waiver of proofs of loss cannot be relied on, unless pleaded.—BROCK v. DES MOINES INS. CO., Iowa, 64 N. W. Rep. 685.

139. INSURANCE—Provisions—Incumbrances.—A provision in a fire insurance policy that it should be void if, without the consent of the company, the property "be in any manner incumbered, and such fact be not stated in this policy or the assured's application for insurance," covers only incumbrances existing when the contract was executed, and does not create a continuing warranty against future incumbrances.—COLLINS v. MERCHANTS' & BANKERS' MUT. INS. CO., Iowa, 64 N. W. Rep. 602.

140. LANDLORD AND TENANT — Abandonment.—While plaintiffs were in possession of a farm under a lease the landlord, without their consent, leased the premises to a third person, who immediately entered, occupied one of the farm houses, and began plowing: Held, that plaintiffs might treat this as an eviction, and abandon the whole premises.—MILLER v. MICHEL, Ind., 41 N. E. Rep. 468.

141. LANDLORD AND TENANT—Abandonment of Premises.—Though a tenant covenanted to keep the premises in a cleanly and healthful condition, he is justified in abandoning the same where the landlord rendered the premises uninhabitable by repeatedly filling up an open sewer underneath said premises, after the tenant had frequently cleaned the same.—SULLY v. SCHMITT, N. Y., 41 N. E. Rep. 514.

142. LANDLORD AND TENANT—Dangerous Condition of Premises. — Defendants leased to a troupe their opera house, which had, between the partitions back of its stage, an opening with a trapdoor without any railing. This opening could have been seen by the troupe's agent when he made the lease. The lease required the lessors to furnish light and heat, and provided that the stage carpenter was to act under the direction of the troupe's stage manager: Held, that the lessors were not liable for injuries to a member of the troupe from falling through the opening because

the passage was insufficiently lighted. — HOLTON v. WALLER, Iowa, 64 N. W. Rep. 633.

143. LANDLORD AND TENANTS—Defective Premises.—A landlord letting a house with a warranty of the safety and sufficiency of the ceiling is liable (not on the warranty itself, but on the ground of negligence) for an injury to the tenant's infant child, resulting from the fall of the ceiling upon it.—MOORE v. STELJES, U. S. C. C. (N. Y.), 69 Fed. Rep. 518.

144. LANDLORD'S LIEN.—Under Code, § 2017, giving a landlord a lien "for his rent" on certain personal property of the lessee, a landlord cannot have a lien for rent where the consideration moving to him under the lease is for rent and other purposes, and it is impossible to determine what part is for rent.—CRILL v. JEFFREY, Iowa, 64 N. W. Rep. 625.

145. LIBEL AND SLANDER—Privileged Statements.—An allegation in a petition by the board of children's guardians, created by Act March 9, 1889, filed for the purpose of obtaining the custody of plaintiff's children, that she "leads a life of low and gross debauchery," being one of the statutory grounds on which the board may obtain such custody, is not actionable.—WILKINS v. HYDE, Ind., 41 N. E. Rep. 536.

146. LIFE INSURANCE—Discretion of Company.—Under a life policy authorizing the company to pay the insurance money to the person appearing to it to be equitably entitled to it, and declaring the receipt of such person therefor conclusive evidence of payment to the person entitled to it, the discretion of the company in making payment to a person as equitably entitled thereto is not reviewable.—BRENNAN v. PRUDENTIAL INS. CO. OF AMERICA, Penn., 32 Atl. Rep. 1042.

147. LIFE INSURANCE—Misrepresentations.—Act 16th Gen. Assem. ch. 55, § 3, provides that when there is a misstatement as to the age of insured, in an application for insurance, the insurer may collect the difference of premium, but no other defense shall be permitted: Held, that in a suit on an insurance contract made in another State, in the absence of evidence to the contrary it will be presumed that the laws of said State are the same as said statute, and therefore such misrepresentation will not avoid the policy.—SEIVERTS v. NATIONAL BEN. ASS'N OF MINNEAPOLIS, Iowa, 64 N. W. Rep. 671.

148. LIFE INSURANCE — Suicide — Insanity. — If one whose life is insured kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequences, and effect, his self destruction will not, of itself, prevent a recovery on the policy. But by capacity to understand the "moral character of his act" is to be understood a capacity to understand what he was doing, and the consequences thereof to himself, his character, his family, and others, and to comprehend the wrongfulness of the act, as a sane man would. — RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK, U. S. C. C. (Penn.), 69 Fed. Rep. 505.

149. LIMITATION.—Code, § 2537, providing that where a plaintiff after commencement of an action fails to prosecute it for any reason other than negligence, a new suit brought within six months shall be deemed a continuation of the first does not apply where the action first commenced was prematurely brought, and dismissed for that reason.—HEUSINKVELD v. CAPITAL INS. CO. OF DES MOINES, Iowa, 64 N. W. Rep. 594.

150. LIMITATION OF ACTIONS—Accounting.—A petition which alleges that defendant was appointed guardian of plaintiff, and received certain money as such, and asked that he be required to report to the court, and that an order be made compelling him to pay over to plaintiff the amount found due, is merely an action for an accounting, and therefore must be brought within the time limited for an accounting.—WYCOFF v. MICHAEL, Iowa, 64 N. W. Rep. 608.

151. LIMITATION OF ACTIONS — Exceptions. — Code, § 2535, extends the time within which actions on behalf of insane persons may be brought to one year after the termination of the insanity. Section 2536 provides that, if a person entitled to sue dies within one year before the expiration of the limitation, such limitation shall not apply until one year after such death: Held, that the statute commences to run when the cause of action accrues, notwithstanding the insanity of the party, and, in case he dies insane, within one year before the statutory period expires, such period is merely extended until one year after his death.—MCNEILL v. SIGLER, Iowa, 64 N. W. Rep. 604.

152. MALICIOUS PROSECUTION — Damages. — Under a general allegation of damage in a complaint for malicious prosecution, evidence of damages resulting from plaintiff's inability, on account of sickness occasioned by such prosecution, to perform a certain contract of employment, is inadmissible.—OLDFATHER v. ZENT, Ind., 41 N. E. Rep. 555.

153. MALICIOUS PROSECUTION—Nolle Pros. at Instance of Accused. — A *nolle prosequi* entered in a criminal prosecution is a sufficient termination of the prosecution to authorize the defendant to sue for malicious prosecution, unless the record shows that the *nolle prosequi* was entered at his instance.—MARCUS v. BERNSTEIN, N. Car., 28 S. E. Rep. 38.

154. MARRIED WOMAN—Separate Estate—Mortgage.—A mortgage by a married woman of her separate estate, as security for the price of land purchased by herself and husband, is void.—DAVIS v. PAGE, Ky., 32 S. W. Rep. 257.

155. MASTER AND SERVANT — Employment—Effect of Sickness. — One who is prevented, by sickness occasioned by no fault of his, from continuing in the service of his employer, under a contract to labor upon a farm for a specified term at a stipulated price per month, may recover reasonable compensation for services performed, irrespective of the rule by which to measure the rights of one who wilifully, and without good cause, quits his employer during the term for which he has agreed to labor.—MCCLELLAN v. HARRIS, S. Dak., 64 N. W. Rep. 522.

156. MASTER AND SERVANT — Evidence.—In an action to recover of an employer for injuries to a minor employee received in the course of a dangerous employment, an instruction which refers to the jury for their determination, from their observance of the injured employee as a witness and their hearing of the testimony, the question of how much allowance should be made for his youth in determining the degree of care and discretion to be expected of him by his employer, is not erroneous.—DISOTELL v. HENRY LUTHER CO., Wis., 64 N. W. Rep. 425.

157. MECHANIC'S LIEN—Time of Filing Claim.—Where labor is performed for a contractor on an improvement on real estate at two different periods of time, and more than 60 days intervene between the last labor day of the first period and the first labor day of the second period, the presumption is that such labor was performed under two different contracts.—HANSEN v. KINNEY, Neb., 64 N. W. Rep. 710.

158. MORTGAGE — Consideration.—A mortgage executed by a wife on her separate property to secure an antecedent debt for family supplies is without consideration where she, at the time the debt was contracted, lived with her husband, and her individual credit was not pledged, though the mortgage recited that she and her husband were jointly and severally indebted for the goods.—CHAFFEE v. BROWNE, Cal., 41 Pac. Rep. 1028.

159. MORTGAGE FORECLOSURE — Appointment of Receivers.—Under a statute declaring that a mortgage of real property shall not be deemed a conveyance so as to enable the mortgagee to recover possession without foreclosure and sale (Gen. Laws Or. 1845 64, p. 228, § 323), the mortgagee has no right to take the rents, profits, and crops before he has secured possession by actual foreclosure and sale according to law; and it is not in the power of the parties, even by express stipulation, to give him such right. Therefore, a provision in a mortgage of farm lands that, in case foreclosure pro-

ceedings are instituted, a receiver may be appointed to take the rents, profits, and crops, and apply them on the debt, in no wise enlarges the mortgagee's rights. In a proper case, the court will appoint a receiver without any such stipulation; and, in any other case, it will not appoint one, whatever the parties may have agreed.—THOMSON v. SHIRLEY, U. S. C. C. (Oreg.), 69 Fed. Rep. 484.

160. MORTGAGES — Foreclosure Sale.—The statute relating to sales on mortgage foreclosure, requiring land in towns or cities to be sold by lots, is directory, merely, and will not prevent the court from ordering a sale in bulk, if it appears to be for the best interest of the parties.—OPPENHEIMER v. REED, Tex., 32 S. W. Rep. 325.

161. MORTGAGES—Liability for Deficiences.—Respondent held notes secured by mortgage against J. J was also indebted to appellant bank. By arrangement between J and the bank, J deeded the mortgaged premises to M. The deed was conditioned that M, the grantee, should pay respondent's mortgage. M knew nothing of the terms of the transfer or of the deed, except that his name was being used by the bank as its trustee to take the title. The bank took possession of the property, and collected the rents, M deeding to it: Held that, as between M and the bank, the latter was equitably liable for deficiency.—CONNOR v. NATIONAL BANK OF DAKOTA, S. Dak., 64 N. W. Rep. 519.

162. MORTGAGE—Oral Assignment.—A non-negotiable note and mortgage may be transferred by a mere oral assignment, followed by delivery; and a petition which alleges generally that the note and mortgage sued on were assigned and transferred to the plaintiff, without stating whether in writing or not, states facts sufficient to constitute a cause of action, and is not open to attack by an objection to the introduction of evidence.—HILL v. ALEXANDER, Kan., 41 Pac. Rep. 1066.

163. MORTGAGES—Record.—The record of a mortgage which, by mistake, fails to describe the land intended to be mortgaged, is not constructive notice to a purchaser of such land, as Civ. Code, §§ 1213, 1214, made the record of a mortgage constructive notice only of "the contents thereof."—DAVIS v. WADD, Cal., 41 Pac. Rep. 1010.

164. MORTGAGE AS EVIDENCE.—The certificate of acknowledgment is sufficient *prima facie* evidence of the execution of a mortgage to entitle it to be read in evidence.—KROM v. VERMILLION, Ind., 41 N. E. Rep. 539.

165. MORTGAGE BY CORPORATION — Ratification.—Where land was purchased for a corporation by its officers without authority, and a mortgage executed for the purchase price, and the corporation, after learning of the transaction, took possession of the land, surveyed and platted it, took its rents and profits, sold some of it, and exercised ownership over it, subject to the mortgage, the corporation, was bound by the purchase and mortgage.—BLOOD v. LA SERENA LAND & WATER CO., Cal., 41 Pac. Rep. 1017.

166. MORTGAGE FORECLOSURE—Parties.—The trustee in a mortgage, with power to sell, is not a necessary party in a suit to foreclose.—PERRYMAN v. SMITH, Tex., 32 S. W. Rep. 349.

167. MORTGAGE FORECLOSURE — Restitution.—Where money was deposited with the clerk of the circuit court to redeem certain mortgaged premises, and the right to redeem was denied on appeal, the money being repaid on application to the clerk before the mortgagee had served him with notice of his claim of a lien thereon for costs, a motion made subsequently that the lien be established is properly overruled.—MEEHAN v. BLODGETT, Wis., 64 N. W. Rep. 429.

168. MUNICIPAL CORPORATIONS—Public Improvement. —Under St. 1890, ch. 428, § 5, and St. 1891, ch. 123, § 1, providing that all damages sustained by any person in his property by the taking of land for or by the alteration of the grade of a public way shall previously be paid by the city or town, one cannot recover for injury to his property by the building of an embankment and bridge by a city on land taken from another, located on the opposite side of the street from his own. —RAND v. CITY OF BOSTON, Mass., 41 N. E. Rep. 484.

169. NEGLIGENCE—Evidence.—In an action for personal injuries, where defendant's negligence was alleged to consist in leaving cars uncoupled on a side track, and the evidence of defendant's trainmen that the cars were securely coupled when left on the track was uncontradicted, and the only evidence that the cars were left uncoupled was the mere fact that they moved away from the others when struck by a train, it was error to submit the question of defendant's negligence to the jury.—JAKOBOSKI v. GRAND RAPIDS & I. R. Co., Mich., 64 N. W. Rep. 461.

170. NEGLIGENCE—Injuries—Contributory Negligence. —In an action for personal injuries caused by falling into an excavation made by defendant in a sidewalk in front of his buildings, the question whether plaintiff was intoxicated at the time, and hence guilty of contributory negligence, is for the jury.—KINGSLEY v. MULHALL, Iowa, 64 N. W. Rep. 659.

171. NEGLIGENCE — Injury to Employee. — A mill owner, who, retaining charge of the running of the machinery in his mill, contracts with another to do the manual labor, knowing that such person will have to employ others, will be liable for injury to an employee of such contractor, resulting from defects in the machinery.—NEIMEYER v. WEYERHAEUSER, Iowa, 64 N. W. Rep. 416.

172. NEGLIGENCE—Pleading.—In an action for injury sustained by the running away of plaintiff's horse from being frightened by one of defendant's servants throwing a keg into the street, an averment that the injury was caused "without any fault or negligence on the part of plaintiff" sufficiently negatives contributory negligence by plaintiff.—KEELEY BREWING CO. v. PARNIN, Ind., 41 N. E. Rep. 471.

173. NEGLIGENCE — Presumption.—Plaintiff was not necessarily guilty of contributory negligence in driving across a railroad crossing in a bobsleigh, with a wagon box loaded with 200 feet of lumber in 12-foot boards, the front ends of which rested on the floor of the box, plaintiff standing on the lumber.—MCDERMOTT v. CHICAGO M. & ST. P. RY. CO., Wis., 64 N. W. Rep. 430.

174. NEGLIGENCE—Proximate Cause.—Where a horse becomes frightened while being driven along a street, and runs away, and by reason thereof collides with a car standing in the street, such fright is the proximate cause of injuries to the driver by such collision.—LAMBECK v. GRAND RAPIDS & I. R. Co., Mich., 64 N. W. Rep. 479.

175. NEGLIGENCE—Proximate Cause.—Where defendant negligently ran a guy wire from a telegraph pole across the street, and a stranger's horse becoming frightened, ran into and broke the wire, causing it to strike and injure plaintiff, defendant's negligence was the proximate cause of the injury.—LUNDEEN v. LIVINGSTON ELECTRIC LIGHT CO., Mont., 41 Pac. Rep. 995.

176. NEGOTIABLE INSTRUMENT—Note — Indorsement. —The indorsee of a note, who again indorses it as collateral, but who obtains possession of it again from the second indorsee for the purpose of suit, may sue thereon in his own name, notwithstanding the second indorsement.—HENDERSON v. DAVISSON, Ill., 41 N. E. Rep. 560.

177. NEGOTIABLE INSTRUMENT — Transfer of Note—Consideration.—A transferee, before maturity, of a negotiable note, with notice of want of consideration, cannot enforce the payment. — SKINNER v. RAYNOR, Iowa, 64 N. W. Rep. 601.

178. NEW TRIAL — Continuance of Motion. — Under Sayles' Civ. St. art. 1372, providing that all motions for new trials shall be determined at the term of court at which said motions shall be made, the court cannot continue a motion to the following term.—LIGHTFOOT v. WILSON, Tex., 32 S. W. Rep. 331.

179. OFFICERS—Policemen—Liability of City for Salary.—Held, that to entitle plaintiff to recover from the city salary as policeman, for a period during which he was not actually in office and was performing none of its duties, it was incumbent on him to prove that he was a policeman *de jure*—that is, that he had been legally appointed.—YORKS v. CITY OF ST. PAUL, Minn., 64 N. W. Rep. 565.

180. OFFICERS — Right to Salaries.—An action to recover salaries by persons claiming to have been officers *de jure* will not lie where it appeared that such offices were filled, and the salaries attached thereto paid to persons who claimed to be legally elected, and whose title to said offices had never been judicially determined, and that the said offices were in existence prior to the election of any of the claimants.—DEMAREST v. MAYOR, ETC. OF CITY OF NEW YORK, N. Y., 41 N. E. Rep. 405.

181. ORDERS — Acceptances—Priorities.—Acceptance by a lessee of an order of the lessor to pay a certain sum out of the first royalties to become due under the lease does not change his rights under the provision of the lease to apply, at his option, the royalties in payment of liens on the property, or make him liable on the orders for any amount in excess of what would become due the lessor after the lessee had exercised his option.—IN RE MAHASKA COAL CO., Iowa, 64 N. W. Rep. 406.

182. PARTNERSHIP—Dissolution.—Where a new bank goes into business in the same rooms which a private bank had occupied, and conducts its business with the same sign and help, the managing partner of the old bank being the president of the new bank, the old bank is primarily liable to one who, having dealings with it, and supposing that it was still conducting business, and that he was dealing with it, makes a deposit in the new bank, dealing with its president.—METZ v. IREDELL, S. C., 23 S. E. Rep. 13.

183. PARTNERSHIP.—On sale by a partner of his interest, and an agreement by the purchaser to pay a certain portion of the selling partner's indebtedness to the firm, such selling partner is liable for any other amount due by him to such firm.—MUELLER v. SUTTER, Iowa, 64 N. W. Rep. 665.

184. PARTNERSHIP—Power to Bind Firm.—The rule that secret restrictions on the authority of a partner, acting within the scope of the partnership business, do not affect third persons who had no notice thereof, is not limited to trading partnerships, but applies also to partnerships formed for other kinds of business.—RICE v. JACKSON, Penn., 32 Atl. Rep. 1036.

185. PARTNERSHIP — Release of Partner.—Where an action was commenced against a firm to subject certain property in its possession to the debts of an insolvent, from whom the firm claimed to have purchased the property, and plaintiff creditors agreed not to levy any execution against the property of one of the partners on any judgment, in consideration that said partner did not resist said suit, and would furnish certain facts relative to the transaction, such agreement did not release the other members of said firm.—BATES v. WILL'S POINT BANK, Tex., 32 S. W. Rep. 339.

186. PARTNERSHIP — Sharing Profits.—A contract under which two persons are to share the profits of a business, but which fails to provide for a sharing of the losses, does not constitute a partnership *inter se*.—WINTER v. PIPHER, Iowa, 64 N. W. Rep. 669.

187. PAYMENT TO AGENT — Effect.—Where the makers pay interest on their note to a person without production of the note, the fact that the note is payable at such person's office, and that interest thus paid is never again demanded, does not authorize the makers to pay the principle of the note to such person as agent of the holder.—KLINDT v. HIGGINS, Iowa, 64 N. W. Rep. 414.

188. PLEADING — Plea in Abatement — Certainty.—A plea in abatement alleging that plaintiff decoyed defendant, a non resident, into the county for the purpose of service of process, will be treated as a meritorious and not a dilatory plea, and as such is sufficiently certain.—CAMPBELL v. HUDSON, Mich., 64 N. W. Rep. 488.

189. PRINCIPAL AND AGENT — Authority of Agent.—Evidence of authority of one as agent to collect for the holder the semi annual interest on a negotiable note, as the interest matures, does not show authority in such person to accept a payment of the principal of the note long before its maturity, when he is not shown to have possession or control of the note.—BRONSON v. ASHLOCK, Kan., 41 Pac. Rep. 1068.

190. PUBLIC LANDS—Homestead Rights.—A homestead settler whose land has been included by the government in allotments made to Indians in fulfillment of treaty stipulations, but who has not perfected his right by making proof in the land office of full compliance with the law, is not entitled, in a suit against certain Indians and an army officer, who threatens to put them in possession, to a decree declaring him to be the owner of the land, and quieting his title. But, as a *bona fide* settler and owner of the improvements, he is entitled to an injunction protecting him in his possessory rights until the questions of law involved can be determined in a court of competent jurisdiction.—LA CHAPELLE v. BUBB, U. S. C. C. (Wash.), 69 Fed. Rep. 481.

191. RAILROAD COMPANY — Accident — Contributory Negligence.—Before plaintiff's servant attempted to drive over a crossing partially obstructed by defendant's car, but leaving eight feet of highway, defendant's servant told him that the car would move on in a minute, and his son cautioned him, not to drive on; that "the mule was scary." Plaintiff's servant struck the mule, which, in driving over, became frightened at the car, and, shying from it, stepped into a hole between the tracks, but within the limits of the highway, and was injured: Held, that plaintiff's servant had a right to rely on defendant's performance of its statutory duty to maintan the highway at the crossing in a safe condition, and the evidence did not, therefore, require the submission of the question of contributory negligence to the jury.—TANKARD v. ROANOKE RAILROAD & LUMBER CO., N. Car., 23 S. E. Rep. 47.

192. RAILROAD COMPANIES—Fire.—In an action for damages by fire set on plaintiff's land, the petition alleged that the land "was under fence, and is and was used by plaintiff for a pasture," and that "said grass, so destroyed, was then worth the sum of $1.50 per acre, or a total of $957:" Held, that plaintiff was not restricted to proof of the value of the grass "for pasture purposes," but might show its value for hay.—GULF, C. & S. F. RY. CO. v. CANNON, Tex., 32 S. W. Rep. 342.

193. RAILROAD COMPANIES — Injury — Contributory Negligence.—Plaintiff walked along beside defendant's tracks, knowing that cars were behind him, and, after passing a switch, looked back, and saw that the cars had passed to another track, and then, without looking again, continued to walk along the track, and was struck by a car afterwards sent on the track by a process known as a "drop switch:" Held, that plaintiff was guilty of contributory negligence.—GULF, C. & S. F. RY. CO. v. WILKINS, Tex., 32 S. W. Rep. 351.

194. RAILROAD COMPANIES—Injury—Pleading.—Where one placed in peril of a moving train by his own negligence is injured, a complaint to recover for such injury, as for wanton recklessness, in that the engineer, knowing of plaintiff's peril, failed to stop the train, must allege that the train could have been stopped in time to avoid the injury.—EVANS v. PITTSBURGH, ETC. RY. CO., Ind., 41 N. E. Rep. 537.

195. RAILROAD COMPANY—Injury to Person on Track.—Mill. & V. Code, §§ 1298-1300, providing that every railroad company that fails to keep some one on the locomotive, always on the lookout ahead, shall be liable for all damages resulting from collisions, does not apply to the making up of trains, and other necessary switching, in a company's yards; and a person there struck by a moving car, without an engine in front and

lookout ahead, can recover if at all, only under the rules of common law.—SOUTHERN RY. CO. v. PUGH, Tenn., 32 S. W. Rep. 311.

196. RAILROAD COMPANIES—Killing Animals—Fences.—Under Rev. St. 1894, § 5323, making a railroad company liable for stock killed by its trains on its right of way, which entered thereon by reason of insecure fencing, the fact that the place where the stock entered could not be found is matter of defense.—LAKE ERIE & W. R. CO. v. ROOKER, Ind., 41 N. E. Rep. 470.

197. RAILROAD COMPANIES — Negligence.—A railroad company is not excused from taking other proper precautions by compliance with statutory requirements as to giving signals at crossings.—CLARK v. CANADIAN PAC. RY. CO., U. S. C. C. (Vt.), 69 Fed. Rep. 543.

198. RAILROAD COMPANIES — Negligence.—The only duty which a railroad company owes to those who, without its knowledge or consent, enter upon its track, not at a crossing or other public place, is not wantonly and unnecessarily to inflict injury upon them after its employees have discovered them. It owes them no duty to keep a lookout for them before they are discovered.—ST. LOUIS & S. F. RY. CO. v. BENNETT, U. S. C. C. of App., 69 Fed. Rep. 525.

199. RAILROAD COMPANY—Opening Street—Damages.—A railroad company is entitled, as part of its damages for the crossing of its tracks by a street, to the cost of erecting and maintaining safety gates or towers, or the employment of flagmen; the jury being satisfied that either is necessary for the protection of the public.—CITY OF GRAND RAPIDS v. BENNETT, Mich., 64 N. W. Rep. 585.

200. RAILROAD COMPANIES — Sounding Whistle.—A dog is within the statute requiring the sounding of the whistle when an animal is seen on a railroad track.—FINK v. EVANS, Tenn., 32 S. W. Rep. 307.

201. RAILROAD FORECLOSURES—Right of Redemption.—Where a junior mortgagee is a party defendant to a foreclosure bill in which there is a prayer that he be decreed to redeem, and a sale is ordered in default of payment, declaring the senior mortgagee's right to redeem forever barred, a similar order as to the right of redemption by the junior mortgagee is not substantially or even formally necessary. He will have a right to redeem without such order, but, if he fail to assert the right, and stand by while the sale is made and confirmed, he must be deemed, in equity, to have waived his right.—SIMMONS v. BURLINGTON, C. R. & N. RY. CO., U. S. S. C., 16 S. C. Rep. 1.

202. RAILROAD MORTGAGES.—Where a railroad mortgage is expressly to secure interest as well as principal, and both are equally within the positive terms of the condition, a default in payment of the interest gives the mortgagee a right to bring a foreclosure suit, especially where, by the express terms of the instrument, he is forbidden to proceed for the collection of interest by ordinary judgment and execution at law.—PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND GRANTING ANNUITIES v. PHILADELPHIA & R. R. CO., U. S. C. C. (Penn.), 69 Fed. Rep. 482.

203. REAL ESTATE AGENT — Commissions.—A broker employed to procure a purchaser, without any provision that he should be a purchaser who would take the property regardless of title, is entitled to commissions where he procured a purchaser ready and willing to buy, and the owner is unable or unwilling to give him a perfect title, and sells to another.—SULLIVAN v. HAMPTON, Tex., 32 S. W. Rep. 235.

204. RELEASE AND DISCHARGE — Effect.—Where, by articles of separation between husband and wife, the wife, for a stipulated consideration, releases the husband from all obligations of support, such release precludes the wife from recovering damages for the loss of her support from one whose conduct with the husband had led to the separation.—METCALF v. TIFFANY, Mich., 64 N. W. Rep. 479.

205. RELIGIOUS SOCIETIES—Transfer of Property.—A church incorporated as a branch of a particular denomination cannot, without consent of all its members, transfer property, acquired for its benefit as such corporation, to another denomination or branch of the same denomination holding different doctrines.—PARK v. CHAMPLIN, Iowa, 64 N. W. Rep. 674.

206. REPLEVIN — Commingling of Goods. — Plaintiff sold defendant certain standing timber, retaining the title until the payment of the purchase price. Defendant cut and manufactured the timber into lumber, mixing it with lumber manufactured by him from timber cut on other tracts, but of the same quality and value: Held, that replevin would lie to recover, out of the common mass, a less quantity of lumber than that contributed from plaintiff's timber. — BENT v. HOXIE, Wis., 64 N. W. Rep. 426.

207. REPLEVIN—Evidence—Possession.—In an action of replevin, the plaintiff must show, in order to justify a verdict or judgment in his favor for a return of the property or its value, an existing and immediate right to the possession thereof. — NICHOLS v. KNUDTSON, Minn., 64 N. W. Rep. 391.

208. REPLEVIN—Title to Support.—The vendee under a land contract, with the right to cut and remove timber, has title sufficient to maintain replevin for timber cut on the land by a mere trespasser.—GAMBLE v. COOK, Mich., 64 N. W. Rep. 482.

209. REPLEVIN BOND — Breach.—Where property is levied upon as the property of a judgment debtor, to satisfy a judgment against him, and the same is replevied from the sheriff by other parties claiming to own it, but who fail to prosecute such action, in an action by the judgment creditor, or by the sheriff representing him, on the undertaking given in the replevin action, his right to recover rests upon his right to have the replevied property applied to the payment of such judgment, and so it should be shown that such judgment is still unpaid.—KNOTT v. SHERMAN, S. Dak., 64 N. W. Rep. 542.

210. RES JUDICATA — Action to Recover Real Property.—In an action to recover real property, brought under the Code of North Dakota, which has abolished the fictions of the old action of ejectment, the judgment is a bar to a subsequent action only when the titles and defenses are the same, and is therefore not a bar where the defense is founded on a title acquired subsequent to the judgment, and which was not and could not have been set up in the earlier action.—NORTHERN PAC. R. CO. v. SMITH, U. S. C. C. of App., 69 Fed. Rep. 579.

211. SALE—Conditional Sale.—Under Code, § 1922, providing that no conditional sale of a chattel shall be valid against any purchaser of the vendee without notice unless the contract of sale be in writing and recorded as a chattel mortgage, an unrecorded conditional sale is void as to one without notice who purchased the chattel from another who, with notice of the conditional sale, had purchased the chattel from the original vendee.—NATIONAL CASH REGISTER CO. v. MALONEY, Iowa, 64 N. W. Rep. 618.

212. SALE—Power of Agent.—A general agent for the sale of stock has power to collect the purchase price thereof before or after delivery.—SAWIN v. UNION BLDG. & SAV. ASS'N OF DES MOINES, Iowa, 64 N. W. Rep. 401.

213. SALE — Warranty — Action for Breach.—Where the complaint alleges a sale, the warranty, breach, and consequent damage, a defense that plaintiff had released his claim against defendant is not available under a general denial.—MILHOLLIN v. SHARP, Ind., 41 N. E. Rep. 552.

214. SALE BY AGENT—Purchase Money Notes.—One in lawful possession of a chattel, with authority to sell, gives good title though he violates his principal's instructions, by taking purchase money notes in his own name.—SCHLEICHER v. ARMSTRONG, Tex., 32 S. W. Rep. 327.

215. SALE OF PERSONALTY—Denial of Seller's Title.—Where the owner of a wagon allowed another to paint

his name and occupation thereon for the purpose of inducing the public to believe that it was the property of such person, the owner is estopped to deny the title of such person, as against one who, acting with due caution and good faith, and being thus misled as to the ownership, buys it of such person, parting with the value therefor. — O'CONNOR'S ADMX. v. CLARK, Penn., 32 Atl. Rep. 1029.

216. SALE ON CONSIGNMENT.—A shipment of goods "on consignment" to one to whom plaintiff had previously been selling, to be held as the property of plaintiff and subject to its order until sold, the price at which they were listed to the consignee to be remitted as fast as they were sold, and, when he took notes in lieu of cash, these notes to be remitted as collateral for his account, does not constitute a sale.—VERMONT MARBLE CO. v. BROW, Cal., 41 Pac. Rep. 1031.

217. SLANDER—Publication.—Using defamatory language to and of a wife in the presence of her husband constitutes a publication of the slander. — LINCK v. DRISCOLL, Ind., 41 N. E. Rep. 468.

218. STEAMERS — Fire Screens — Fires. — Though a steamer is engaged in interstate commerce, and is equipped with all machinery and appliances required by the act of congress and the regulations adopted thereunder by the board of supervising inspectors, it is subject to Act No. 183, Pub. Acts 1881, requiring steamers using wood for fuel to be provided with spark arresters, and making the vessel's owner liable for loss by fire occasioned by neglect to comply with the act; such act not being in conflict with the federal legislation.—BURROWS v. DELTA TR. NSP. CO., Mich., 64 N. W. Rep. 501.

219. TAXATION—Exemption.—A building belonging to a Young Men's Christian Association, and used partly for the purposes of the association, and partly rented for business purposes, is not exempt from taxation under Rev. St. 1893, ch. 120, § 2, cl. 2, exempting from taxation "all church property actually and exclusively used for public worship."—PEOPLE v. YOUNG MEN'S CHRISTIAN ASS'N OF PEORIA, Ill., 41 N. E. Rep, 557.

220. TAXATION — Exemption. — Vacant and unused land held by a college for sale, the proceeds of which do not appear to be restricted to any particular use, is not within McClain's Code, § 1271, exempting from taxation grounds and buildings of literary institutions devoted solely to the appropriate objects thereof, and not leased, or otherwise used with a view to pecuniary profit.—FOY v. COE COLLEGE, Iowa, 64 N. W. Rep. 636.

221. TAXATION—Exemption—Library.—A building belonging to an incorporated library association, partly used for a library, and partly leased for business purposes, is subject to taxation, not being expressly exempted by statute.—PEOPLE v. PEORIA MERCANTILE LIBRARY ASS'N, Ill., 41 N. E. Rep. 557.

222. TAXATION — Transient Merchants — Licenses.—An ordinance requiring transient merchants to pay a license is not open to the objection of not being uniform in its operation, or of being class legislation.—CITY OF OTTUMWA v. ZEKIND, Iowa, 64 N. W. Rep. 646.

223. TELEGRAPH COMPANY—Delay — Sunday Laws.—It is no defense to an action for delay in delivering a telegram requesting the addressee, in South Dakota, to furnish stable room for horses in transit from Iowa, the transportation through the former State taking place on Sunday, that the laws of South Dakota prohibit such transporation on Sunday.—TAYLOR v. WESTERN UNION TEL. CO., Iowa, 64 N. W. Rep. 660.

224. TENANCY IN COMMON—Creation by Will.—Under a will devising one-fourth of testator's land to each of four sons, providing that the share of the first son should begin at the boundary, and that the shares of the rest should be bounded, each by the boundary of his predecessor, but further providing that they should take "share and share alike," the devisees take as tenants in common.—MIDGETT v. MIDGETT, N. Car., 23 S. E. Rep. 37.

225. TRESPASS—Grading Highway.—To justify a road supervisor in removing gravel from a highway, to be deposited in low places on the same highway, the removal must be for the improvement of the highway, and not merely the replacing of the material at the remote point.—ANDERSON v. BEMENT, Ind., 41 N. E. Rep. 547.

226. TROVER—Action by Assignee of Mortgage.—In trover by the assignee of a mortgage on chattels against an attaching officer, the defense that the attachment was issued before plaintiff's assignment was made is without merit, where it appears that there was also a subsequent conversion by defendant.—HULL v. BERNATZ, Mich., 64 N. W. Rep. 473.

227. TRUSTS — Evidence — Declarations.—Where deceased in his lifetime, inclosed in separate envelopes certain negotiable instruments, with bills of sale thereof to his daughter and grandson, respectively, and indorsed their respective names on each envelope, and declared that he had set them apart and held them in trust for said persons, a trust was thereby created, though deceased, during his life, retained said instruments in his possession, and collected the interest thereon.—O'NEIL v. GREENWOOD, Mich., 64 N. W. Rep. 511.

228. TRUSTS — Powers of Trustees — Lease. — Where land deeded in trust to rent, and pay over the rents, and, on the happening of a certain event, to deed in fee, is subject to the right of another to a renewal of a lease thereon, the trustee may be compelled to execute the renewal lease.—GOMEZ v. GOMEZ, N. Y., 41 N. E. Rep. 420.

229. WATERS—Navigable Streams—Loggers.—Where, in an action to recover for defendant's interference, by the construction of a dam, with plaintiff's right to float logs in a navigable stream, the record is silent as to defendant's right to construct the dam, it will be presumed that proper proceedings therefor were taken by him.—PRATT v. BROWN, Mich., 64 N. W. Rep. 583.

230. WATERS — Navigable Waters—Obstruction.—One who constructs a bridge across a navigable stream without any draw therein for the passage of boats will be liable for special damage to a boat owner, whose business, in common with other boat owners, requires the transportation of material for manufacturing purposes from a point below the obstruction to a point above.—FARMERS' CO-OPERATIVE MANUF'G CO. v. ALBEMARLE & R. R. CO., N. Car., 23 S. E. Rep. 43.

231. WATERS — Riparian Rights.—Code, § 2751, as amended in 1893, makes it the duty of the authorities of an incorporated town, on navigable waters, on application of a riparian owner of land adjacent to those covered by water, to regulate the line on "deep water" to which wharves may be built: Held that, where such authorities, on application of a riparian owner, fix such deep water line, but the line fixed is not in fact on deep water, the fact that such applicant afterwards obtains from the State a grant of the land adjacent to his covered by water, based on such line, does not constitute a waiver by him of the right to have such authorities locate the line a second time, and on deep water.—WOOL v. TOWN OF EDENTON, N. Car., 23 S. E. Rep. 40.

232. WATER COMPANIES — Reasonableness of Regulation.—A private corporation which procures from a municipal corporation a franchise for supplying the latter and its inhabitants with water, and by virtue of which franchise it is permitted to and does use the streets and alleys of such municipal corporation in the carrying on of its business, becomes thereby affected with a public use, and assumes a public duty. That duty is to furnish water at reasonable rates to all the inhabitants of the municipal corporation, and to charge each inhabitant, for water furnished, the same price it charges every other inhabitant for the same service under the same or similar conditions.—AMERICAN WATER-WORKS CO. v. STATE, Neb., 64 N. W. Rep. 711.